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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-619

GETTY OIL COMPANY,
Petitioner,

vs.

DEPARTMENT OF ENERGY and
JAMES R. SCHLESINGER, Secretary of Energy,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Petitioner respectfully requests this Court to issue its writ of certiorari and review the judgment and opinions of the Temporary Emergency Court of Appeals entered in this action on July 18, 1978, which affirmed an order of the District Court granting summary judgment in favor of respondents.

OPINIONS BELOW

The majority opinion of the Temporary Emergency Court of Appeals unofficially is reported at CCH Energy Management Reporter ¶26,108. Both the majority and dissenting opinions are reproduced in the Appendix at pages 1a through 14a. The memorandum opinion and order of the United States District Court for the Northern District of Oklahoma is reported at 448 F. Supp. 16 under the caption *Skelly Oil Co.* v. *FEA* and is reproduced in the Appendix at pages 15a through 26a. The final decision of the Federal Energy Administration, dated March 19, 1976, from which petitioner sought judicial review, is reproduced in the Appendix at pages 27a through 41a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1), §211(g) of the Economic Stabilization Act, 12 U.S.C. §1904 note, and §5(a)(1)(A) of the Emergency Petroleum Allocation Act, 15 U.S.C. §754(a)(1)(A). The Temporary Emergency Court of Appeals rendered its decision on July 18, 1978 and denied petitioners' timely request for rehearing and suggestion for rehearing en banc on September 11, 1978. (App., 42a) The Court of Appeals and District Court had jurisdiction pursuant to §211 of the Economic Stabilization Act and §5(a)(1)(A) of the Emergency Petroleum Allocation Act.

QUESTIONS PRESENTED

The Temporary Emergency Court of Appeals determined that respondents' price control regulations by their terms did not cover solvents; but nevertheless a majority of the panel held that petitioner violated non-existent regulations controlling solvent prices that they thought the agency should have issued.

The questions presented by this petition transcend the interest of petitioner Getty Oil Company and other petroleum companies similarly affected by the majority's retroactive imposition of price controls on solvents. The majority's decision affects the basic fabric of administrative and Consititutional law. The questions presented for review are:

1. Whether the Constitutional doctrine that regulations violate due process and thus are invalid if they are unduly vague requires, *a fortiori*, that the claim that Getty violated admittedly non-existent regulations be dismissed?

2. Whether the Temporary Emergency Court of Appeals erred in holding that the Emergency Petroleum Allocation Act conferred a mandatory duty upon the Federal Energy Administration to control solvent prices; especially in light of (a) the agency's contrary finding that the statute is ambiguous, and its consequent admissions that the decision whether to control solvent prices was an exercise of its discretion, plus (b) the terms and legislative history of the Act and prior judicial decisions emphasizing that discretion?

3. Assuming *arguendo* that the Federal Energy Administration had a statutory duty to control solvent prices, with which it failed to comply, whether it was error for the Temporary Emergency Court of Appeals to find that the "deficiency" was "immaterial" and to hold petitioner retroactively liable for more than $2.5 million for violating regulations that the agency should have issued but did not?

4. Whether, in the absence of any evidentiary hearing before the administrative agency or any trial before the District Court, the Temporary Emergency Court of Appeals erred in basing its decision on the agency's disputed factual finding, rejected by the District Court, that Getty should have known during the relevant period that the agency intended to control solvent prices?

PERTINENT CONSTITUTIONAL PROVISION, STATUTE AND REGULATION

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 4(a) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 753(a), provided throughout the period May 1, 1974 to January 10, 1975:

> Not later than 15 days after the date of enactment of this act, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (d), such regulation shall take effect not later than 15 days after its promulgation. Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

The definitional section of the price control regulations published by the Federal Energy Administration pursuant to § 4(a) of the Emergency Petroleum Allocation Act, 10 C.F.R. § 212.31, provided in pertinent part throughout the period May 1, 1974 to January 10, 1975:

> "Covered products" means crude oil, residual fuel oil and refined petroleum products.
>
> * * *
>
> "Refined petroleum product" means gasoline, kerosene, middle distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.
>
> * * *

> "Middle distillates" means Nos. 1 and 2 heating oils, Nos. 1-D, 2-D, and 4-D diesel fuels, No. 4 fuel oil, kerosene and aviation fuels.

STATEMENT OF THE CASE

1. *Introduction.* This petition seeks review of a divided decision by a panel of the Temporary Emergency Court of Appeals (majority opinion by Becker, J., for himself and Carter, J.; Zirpoli, J., dissenting) holding that Getty[1] violated an administrative regulation which admittedly did not even exist during the relevant time period—May 1, 1974 through January 10, 1975—and requiring Getty to pay approximately $2.5 million plus interest for that purported violation.

The majority's unprecedented decision ignores decades of developments in Constitutional and administrative law embodied in decisions of this Court and the regular circuit courts of appeal. It is well established that when governmental agencies fail to write regulations that are sufficiently clear, so that men of common intelligence must guess at their meaning and differ as to their application, the offending regulations are Constitutionally invalid and may not be enforced. When agencies fail to notify the public of their rules and regulations, the regulations are equally invalid. Here, both courts below recognized and the agency[2] admitted that the Federal Energy Administration ("FEA") had not promulgated any regulation which proscribed Getty's alleged activities. If vague regulations may not be enforced, then it should follow, *a fortiori,* that nonexistent regulations cannot be enforced either.

The Court of Appeals' stated basis for its decision threatens both to disrupt the nation's effort to deal with its energy

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[1] Throughout this petition, the name "Getty" refers to both Getty Oil Company and its predecessor in interest, Skelly Oil Company. (*See* App., 2a)

[2] Similarly, references to the "agency" in this petition mean the Federal Energy Administration or its successor, the Department of Energy, whichever is appropriate. (*See* App., 2a)

problems and to inundate the federal courts with complex cases that entirely could be avoided. In creating the Federal Energy Administration and later the Department of Energy, Congress vested those agencies with wide discretion to write regulations which the agency determined would best satisfy numerous competing national goals. Prior decisions of the Temporary Emergency Court of Appeals emphasized the discretion of the agency to determine how to reconcile those goals and thus determine the public interest. Exactly contrary to those prior decisions by other panels of the same Temporary Court, the majority below ignored the agency's regulations and substituted their own judgment of what the agency should have done. By denigrating the agency's regulations and exalting their own impression of how the agency should act, the majority undercut the agency's ability to cope with its tasks and encouraged large quantities of litigation that federal courts can ill afford. For if the agency cannot write regulations that mean what they say, without being subject to revision by the Temporary Emergency Court of Appeals, then the agency's words are worthless and the public must turn to the courts for decisions which regulate their daily affairs.

By punishing Getty, the majority's decision mocks both logic and justice. Getty faithfully followed those regulations that did exist. The majority ignored the actual regulations upon which Getty relied and decreed that other regulations should also have existed. Even if the agency's regulations were deficient, it does not follow that the majority's amendments should be applied retroactively and that Getty should pay millions of dollars for the agency's mistake. As the dissent concluded, "The agency's failure . . . cannot, in fairness to Getty, be cured in the manner approved by the majority." App., 14a)

2. *The Administrative Proceeding.* This action commenced as an administrative proceeding. On October 31, 1974, the FEA sent Getty a "Notice of Probable Violation," alleging that Getty had increased the price of solvents that it sold after May

1, 1974 by more than its increased costs. (R. 11) During the period May 1, 1974 to January 10, 1975, however, the FEA's price control regulations did not cover solvent prices.[3] As Judge Zirpoli stated in his dissent, "even the agency concedes that the pricing regulations, by their literal terms . . . simply failed to cover solvents." (App., 13a) It was not until after Getty responded to the Notice of Probable Violation, on November 12, 1974 (R. 4), that the agency amended its price control regulations to cover solvents. *See* 40 Fed. Reg. 2795 (January 16, 1975). Those amendments did not purport to be retroactive. After January 16, 1975, Getty fully complied with the new controls on solvent prices.

The agency did nothing, except change its regulations, between November 1974, when Getty responded to the Notice of Probable Violation, and November 1975. On November 24, 1975, the FEA issued a "Remedial Order" which stated, contrary to the agency's express regulations, that Getty's solvents were "covered products" between May 1, 1974 and

[3] A chain of three definitions lists all products that the FEA made subject to its price control regulations during the period May 1, 1974 to January 10, 1975:

> "Covered products" means crude oil, residual fuel oil and *refined petroleum products.* (Emphasis added)
>
> * * *
>
> "*Refined petroleum products*" means gasoline, kerosene, *middle distillates* (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel. (Emphasis added)
>
> * * *
>
> "*Middle distillates*" means Nos. 1 and 2 heating oils, Nos. 1-D, 2-D and 4-D diesel fuels, No. 4 fuel oil, kerosene and aviation fuels. (Emphasis added)

10 C.F.R. § 212.31. It is undisputed that solvents are not included in any of the items listed above as they are thus defined.

January 10, 1975, and directed Getty to refund $2.594 million plus interest to its customers. (R. 13) Getty filed an administrative appeal from the Remedial Order on December 12, 1975. There was no trial or administrative hearing, no taking of evidence, no administrative record and no findings of fact based on such a record at this or any other stage of the administrative proceeding. On March 19, 1976, the FEA's Office of Exceptions and Appeals issued a final order denying Getty's appeal. (R. 25; App., 27a)[4]

The FEA's eventual justification for charging Getty with violating price controls during the eight and one half months before it promulgated a regulation covering solvents on January 16, 1975, was that Getty *should have known* that the agency *intended* to control solvent prices. Even if that were a proper method of administering highly technical economic regulations, there is no basis in an administrative record or otherwise for holding that Getty should have known the FEA's intentions. What, if anything, Getty knew or should have known about the agency's true intentions and what those intentions truly were are facts that have never been determined.

Despite the lack of any evidentiary hearing before the FEA, the District Court promptly ratified the FEA's administrative decision by granting its motion for summary judgment. Consequently, the "evidence" on which the agency and majority relied consists entirely of *post hoc* speculation that never has been tested.

The agency offered three specific pieces of "evidence" to support its position that Getty should have known that the FEA, despite the plain meaning of its regulations,[5] actually

[4] The FEA remanded the restitution aspect of the Remedial Order to the local regional office. (App., 40a) The FEA has not yet issued a revised Remedial Order. The issues of the amount of restitution and interest and the authority of the agency to make such an order thus have not been raised in this action and are not before this Court.

[5] *See* n.3, *supra.*

intended to control solvent prices. The first "evidence" was that during the same period, the FEA did make solvents subject to its allocation regulations, 10 C.F.R. Part 211.[6] Judge Zirpoli, dissenting, pierced the majority's reliance on that "evidence" with two easy thrusts:

> The fact that a certain product is covered by the allocation regulations, however, does not lead inexorably to the conclusion that such product is also covered by the agency's pricing regulations. *Some products have in fact been intentionally subjected to one set of controls but not the other.*[3] More significant, perhaps, since the question before this court is the degree of notice Getty should be presumed to have received from the allocation regulations, is the fact that *counsel for neither Getty nor the agency could state with certainty at oral argument whether the pricing and allocation regulations have always been precisely parallel.* The agency argues that Getty should have read the regulations as a whole and thus realized that since solvents were subject to allocation controls they were also subject to price controls. Such an argument loses considerable force when counsel for the agency cannot say whether any products have ever been subject to only one set of regulations. (App., 13a-14a; emphasis added)

[3] Naphthas used as synthetic natural gas feedstocks, for example, are presently subject to allocation but not price controls. 10 C.F.R. § 210.35(d)(1) and (2).

[6] The majority mistakenly relied on dicta in *National Helium Corp.* v. *FEA*, 569 F.2d 1137 (T.E.C.A. 1977) to support this analogy. In his dissent, Judge Zirpoli explains the difference between this case presently before the Court, where the "pricing regulations, without ambiguity, simply failed to cover solvents," and *National Helium*, where the court found "an ambiguity in the regulations." (App., 13a n.2) In addition, the *National Helium* dicta in footnote 17 merely asserted that coverage by one set of regulations was rulemaking notice as to the other set. It did not hold that price and allocation regulations were co-extensive

Subsequent to oral argument, counsel for the government advised the Court that several specific products had been subject to either price controls or allocation but not both. Furthermore, the agency's allocation regulations contained a different set of definitions than the price control regulations. Those definitions expressly included "solvents" within the list of products covered by the allocation program. 10 C.F.R. § 211.201.[7] Thus, if Getty should have drawn any conclusions from the differences between the allocation and price control programs that the FEA administered, it was that during this particular period price controls did *not* cover solvents.

Moreover, the FEA's pricing regulations are so complicated by themselves that it is not feasible to interpret them by reference to the allocation regulations. Just during the period April 1974 to January 1975, the agency issued numerous amendments, corrections, revisions, interpretations and other changes to its price control regulations.[8] This list does not

[7] *Compare* § 211.181-182, which stated that solvents were not included within the specialized allocation program for naphtha.

[8] *See, e.g.*, 39 Fed. Reg. 12354 (April 5, 1974), amending § 210.21, adding §210.34 and amending §212.31; 39 Fed. Reg. 12997 (April 10, 1974), revising §§ 212.53(c) and 218.81(f)(5); 39 Fed.Reg. 13258 (April 12, 1974), correcting §212.31; 39 Fed.Reg. 15139 (May 1, 1974), amending § 212.83(c)(2), revising §§ 212.101 and 212.103(c); 212.103(c); 39 Fed.Reg. 17293 (May 14, 1974), removing §212.88 and adding § 212.94; 39 Fed.Reg. 17764 (May 20, 1974), interpreting Part 212; 39 Fed.Reg. 17975 (May 22, 1974), amending § 212.83(c)(2); 39 Fed.Reg. 18638 (May 29, 1974), adding § 212.112; 39 Fed.Reg. 22133 (June 20, 1974), revising § 210.62(a); 39 Fed.Reg. 23251 (June 27, 1974), amending § 212.74(b); 39 Fed.Reg. 24358 (July 2, 1974), amending §§ 212.31 and 212.83(c)(2); § 212.83(c)(2); 39 Fed.Reg. 24924 (July 8, 1974), revising § 212.112; 39 Fed.Reg. 25359 (July 10, 1974), revising § 212.112; 39 Fed.Reg. 26286 (July 18, 1974), correcting § 212.112; 39 Fed.Reg. 28609 (August 9, 1974), revising § 212.83(c)(1)(iii); 39 Fed.Reg. 30829 (August 26, 1974), amending § 212.83(c)(2); 39 Fed.Reg. 31623 (August 30, 1974), revising §§ 212.72 and 212.74(b) § 212.74(b) and adding § 212.131; 39

(footnote continued)

include numerous other proposals to change those same regulations plus various other solicitations of public comment.[9]

(footnote continued)
Fed.Reg. 22133 (September 5, 1974), removing §§ 212.81, 210.82 and 210.83 and, at 32308, amending §§ 212.83(d)(1) and (2) and 212.93(e); 39 Fed.Reg. 32286 (September 5, 1974), adding § 212.132; 39 Fed.Reg. 35509 (October 1, 1974), republishing § 210; 39 Fed.Reg. 36320 (October 9, 1974), interpreting § 212; 39 Fed.Reg. 38365 (October 31, 1974), amending § 212.83(b) and adding § 212.84; 39 Fed.Reg. 39261 (November 6, 1974), redesignating § 212.93(f) as 212.93(g) and adding new § 212.93(f); 39 Fed.Reg. 42249 (December 4, 1974), revising § 212.131; 39 Fed.Reg. 42369 (December 5, 1974), amending § 212.31, §§ 212.51 and 212.82; and § 212.82; 39 Fed.Reg. 42373 (December 5, 1974), amending § 212.84(a), removing § 212.85 and adding § 212.87, amending §§ 212.111(b) and 212.112(b) and removing §§ 212.121 to 212.125; 39 Fed. Reg. 43389 (December 13, 1974), correcting § 212.82(b)(2); 39 Fed. Reg. 44406 (December 24, 1974), revising §§ 210.34(a) and 210.34(b), amending §§ 212.31 and 212.83(c)(2), and redesignating adding §§ 212.83(c)(1)(iv) and 212.83(d)(3), redesignating § 219.93(f), and (g) as § 212.93(g) and (h), adding new § 212.93(f), and adding §§ 212.141 to 212.150; 40 Fed.Reg. 2795 (January 16, 1975), amending §210.21 and revising § 212.1(a); 40 Fed.Reg. 2796 (January 16, 1975), amending § 212.31.

[9] *See e.g.*, 39 Fed.Reg. 17771 (May 20, 1974), proposing new § 212.84; 39 Fed.Reg. 18471 (May 28, 1974), proposing to amend § 210.62(a); 39 Fed.Reg. 25602 (July 11, 1974), proposing to delete § 210 subpart F; 39 Fed.Reg. 28646 (August 9, 1974), proposing to amend § 212.129; 39 Fed.Reg. 30505 (August 23, 1974), extending time for comments on proposed amendments to § 212.129; 39 Fed.Reg. 32309 (September 5, 1974), proposing to revise § 212.83(b) and add § 212.84; 39 Fed.Reg. 32310 (September 5, 1974), further notice of proposed rulemaking on §§ 212.83 and 212.84; 39 Fed.Reg. 32718 (September 10, 1974), proposing to revise §210.31 and make extensive changes in § 212; 39 Fed.Reg. 33015 (September 13, 1974), correcting text in proposed § 212.84; 39 Fed.Reg. 33381 (September 17, 1974), rescheduling public hearing re revision of Part 212; 39 Fed.Reg. 37072 (October 17, 1974), notice of public hearing on proposed amendment to 10 C.F.R. § 212.129; 30 Fed.Reg. 38395 (October 31, 1974), further notice of proposed rulemaking to amend § 212.84; 39 Fed.Reg. 39740 (November 11, 1974), revising proposed amendments to § 212.131.

Furthermore, the agency made many, many more amendments, corrections, etc. to other parts of its regulations also affecting Getty. It may be, as the agency now seems to argue, that these regulations did not accurately reflect the agency's subjective intent. But Getty then believed that its duty was to follow what the agency's regulations stated and not to divine hidden or unstated meanings. If due process and fair notice mean anything, they surely mean that Americans should not have to consult with soothsayers or use ouija boards to learn what their government requires.

The only other "evidence" that the agency could muster in support of its contention that Getty should have known that the FEA intended to control solvent prices was § 4(g) of the Emergency Petroleum Allocation Act,[10] and the fact that the Cost of Living Council previously had controlled solvent prices pursuant to the Emergency Stabilization Act of 1970.[11] That was not sufficient to overcome the plain language of the agency's regulations, which admittedly stated that solvents were not covered by the price control regulations,[12] since the Stabilization Act expired prior to the time period covered by this dispute.

3. *The District Court's Decision.* Getty sought judicial review of the agency's decision in the United States District Court for the Northern District of Oklahoma. The District Court disagreed with the agency's finding that Getty knew or should have known that the FEA intended to control solvent prices, stating:

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[10] That section did not apply to products like solvents which, as the agency determined (App., 32a-33a), the FEA had discretion whether or not to make subject to its price controls. In any event, that section apparently never was used and, in later 1975, was legislated out of existence.

[11] Since that same Act authorized the Cost of Living Council to control the price of everything from aardvarks to zucchini, it scarcely can be held to have conveyed to Getty notice that FEA intended to regulate solvents.

[12] *See* n.3, *supra*,

> The Court does not mean to attribute any degree of bad faith to Skelly for its interpretation of the April 5, 1974 regulation, *and it would agree that "Skelly is not a seer nor can it divine the intent of FEA underlying its own regulatory definitions."* (App., 26a, emphasis added)

Notwithstanding this finding that Getty had no knowledge of the agency's purported intent to control solvent prices, the District Court granted summary judgment on the theory that the agency's failure to control solvent prices was "void" and therefore that Getty had violated the regulations controlling solvent prices that the agency *should* have issued. (App., 25a-26a)

4. *The Opinions by the Temporary Emergency Court of Appeals.* Getty appealed to the Temporary Emergency Court of Appeals. Like the District Court, the majority held that the agency itself had violated the Emergency Petroleum Allocation Act by issuing regulations which did not control solvent prices. Building on this erroneous premise, the Court declared that "any deficiency in the regulation" was "immaterial" (App., 7a) and then "construed" (App., 7a) the agency's regulations as if they had covered solvents during the relevant period. After finding that Getty should have known that FEA intended to regulate solvent prices, the Temporary Emergency Court of Appeals concluded that Getty had violated the FEA's regulations, as thus retroactively "construed," and affirmed the summary judgment granted by the District Court.

Contrary to the majority's reasoning, not even the agency contended that it was obligated as a matter of law to control solvent prices. Throughout this litigation, the agency has emphasized the discretionary nature of that decision. Thus, the author of the regulations in question, Dr. J. Lisle Reed, Director of the Office of Oil and Gas for the FEA, emphasized this fact in his affidavit, which the FEA filed with the District Court:

> It was my belief, based on my reading of the legislative history of the EPAA and my knowledge of

> the petroleum industry generally that the Congress did not intend this list [of covered products] to be all inclusive, and that *the Congress expected the President to exercise judgment in determining which products Congress intended to have subject to regulation under the EPAA.* (R. 205-06, emphasis added)

Dr. Reed further stated in his affidavit that the terms Congress used in the Emergency Petroleum Allocation Act were vague and imprecise (R. 192-94) and thus required interpretation by the agency. Even the agency's final order stated that the determination whether to control solvent prices was an exercise of "the FEA's administrative discretion." (App., 32a-33a) Judge Zirpoli agreed with the agency's expert and its final order, stating that "the agency itself, prior to the institution of this litigation, clearly considered its regulation of solvents an exercise of discretion rather than a discharge of ministerial obligation." (App. 10a-11a)

The majority's conclusion that the agency had a mandatory duty to control solvent prices begs the critical question. As Judge Zirpoli observed.

> It requires a considerable amount of interpretation to reach the conclusion that solvents should be included within the scope of the statute, and it is questionable whether one would reach that conclusion at all without the benefit of the presumption that great weight is to be accorded the agency's interpretation of its statutory mandate. (App., 10a)

In other words, in order to conclude that the agency had a *mandatory* duty to control solvent prices, the majority first had to accept the agency's *discretionary* decision that solvents were included within the meaning of "naphtha" as naphtha was used

within the legislative history of the Emergency Petroleum Allocation Act.[13] Only Judge Zirpoli was able to pierce this paradox:

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[13] (*See* R.206) Neither the Emergency Petroleum Allocation Act nor the legislative history of that Act refers to solvents at any point. The courts below accepted the agency's argument that solvents were included within the meaning of "naphtha" and held against Getty's argument that naphtha and solvents are different things, apparently because solvents sometimes are called "special naphthas." (App., 4a) However, the Act does not refer to naphtha either, and the legislative history makes only the following reference to naphtha:

> Special mention should be made of the term "refined petroleum product" which is taken from the House amendment. This term is defined to mean kerosene, gasoline, distillates (including Number 2 fuel oil), LPG (as further defined to mean propane and butane), refined lubricating oils, or diesel fuel. The conference committee considers the term "kerosene" to also encompass jet fuel and the term "diesel fuel" to also refer to light commercial heating oil. It is understood that the term "distillates" when applied in a technical sense would encompass only Numbers 1, 2, and 4 fuel oils. *It is the committee's intent, however, that this term also reach to include naphtha and benzene so as to require the allocation of these products as may be necessary to accomplish the objective of restoring and fostering competition in the petrochemical sector of industry.* In this respect the conference committee wishes to emphasize that, in expressing congressional concern with fostering competition in the petrochemical industry, the committee intends to also identify petrochemical feedstock needs as important end-uses for which allocation should be made. (Conf. Rep. No. 93-628, 93d Cong. 1st Sess., reprinted in [1973] U.S.Code Cong. & Admin. News 2688, 2693, emphasis added)

In the Courts below, Getty unsuccessfully argued that since solvents were not used as petrochemical feedstocks, this bit of legislative history did not refer to solvents and thus the agency could not choose to control solvent prices. Even though Getty also relied on various agency regulations which stated that solvents were *not* naphtha (*e.g.* § 211.182), the Temporary Emergency Court of

(footnote continued)

> While the EPAA seems to impose a mandatory duty on the President to regulate the price of "each refined petroleum product," *the scope of that phrase is so ambiguous as to necessarily invest the agency with a certain amount of discretion in determining precisely what products are subject to regulation.* That discretion is not transformed into a mandatory duty merely by virtue of its exercise, particularly when, as Getty contends is the case here, that discretion is sought to be exercised retroactively. (App., 12a; emphasis added)

Finally, after determining that FEA had a mandatory duty to control solvent prices (App., 6a-7a), contrary to the agency's own view; and after accepting the "finding" by the agency that Getty should have known that the agency intended to control solvent prices (App., 8a), contrary to the District Court's decision; the majority rewrote the agency's regulations and held Getty retroactively responsible for what the majority themselves described as the agency's mistake. The damage that this decision does to Getty could well exceed $3 million. The damage it will do to the Nation's energy program, the docket of the federal courts and Constitutional guarantees as interpreted by this Court is far more substantial.

(footnote continued)
Appeals called this argument "hypertechnical." (App., 6a) Presumably, the majority opinion has voided all those regulations and, as a matter of law, every reference to naphtha in the agency's regulations now should be read to include solvents even if the regulations state otherwise.

The fact that the agency had to rely upon its interpretation of "naphtha" as used in this legislative history in order to conclude that it could control the price of solvents vividly demonstrates the difficulty that a private party would have had realizing that the FEA intended to control solvent prices even though it did not mention either naphtha or solvents in its price control regulations.

REASONS FOR THE WRIT

1. The Majority's Decision Ignores Well-Established Constitutional Principles Which Make the FEA's Regulations Void for Vagueness and for Lack of Notice as Applied to Getty's Solvents

In the majority decision below, the Temporary Emergency Court of Appeals "construed" respondents' price control regulations to cover Getty's solvents even while admitting that by their terms, the regulations did not extent to solvents. (App., 7a) The majority then dismissed Getty's contention that this construction of the agency's regulations violated due process with a decision entirely contrary to fundamental Constitutional principles embodied in decisions of this Court.

This Court has often repeated that statutes or regulations are void if they are unduly vague. Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[14] *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). "Words which are vague and fluid . . . may be as much a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U.S. 174, 176 (1952). "In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Refining Co.* v. *Corporation*

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[14] Violation of the agency's regulations is a criminal offense.

Commission of Oklahoma, 286 U.S. 210, 243 (1932). *See also Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 287 (1961).

Adequate notice is another element of due process. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 318-20 (1950); *Anderson National Bank* v. *Luckett,* 321 U.S. 233, 246 (1944). Thus, in *Armstrong* v. *Maple Leaf Apartments, Ltd.,* 436 F. Supp. 1125, 1145-46 (N.D. Okla. 1977), a United States statute—not just a regulation—was held unconstitutional as applied since it never was codified in the United States Code, did not appear in United States Code Annotated and, "[t]here is no evidence in the record that the defendants had actual notice or knowledge of this Act or its contents prior to the filing of this action."

Application of these basic constitutional standards to price control statutes and regulations is beyond doubt. *See, e.g., United States* v. *Cohen Grocery Co.,* 255 U.S. 81 (1921); *Federal Power Commission* v. *Texaco Inc.,* 417 U.S. 380, 394-97 (1974). Indeed, in a case heard by another panel of the Court below, respondent was warned that its entire system of price control regulations was in danger of being struck down for vagueness and lack of notice. *See Longview Refining Co.* v. *Shore,* 554 F.2d 1006, 1014 (T.E.C.A.), *cert. denied,* 434 U.S. 836 (1977). Even with its specialized knowledge of the agency's regulations, the Temporary Emergency Court of Appeals found that "it is difficult, even for experts, to understand these complex regulations, as is evidenced by the frequent corrections, modifications, changes, and clarifying rulings." (554 F.2d at 1023; *see also* 554 F.2d at 1014) Pointedly, the Court then referred respondent to the applicable law:

> Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. [Citations omitted] One can have knowledge of a legal duty imposed by regulations only when there is adequate notice. (554 F.2d at 1014 n.20)

The majority's decision fails to comply with this standard in *Longview* or prior decisions of this Court. If regulations which are vague or are issued without proper notice are invalid, then it certainly must follow that enforcement of regulations which did not even exist also offends due process.

The majority not only failed to apply the proper legal standards but they did not even comprehend the problem. The majority's opinion states merely that the Emergency Petroleum Allocation Act and the agency's regulations, taken as a whole, "were not so vague that a due process violation occurred." (App., 9a) Getty did not argue that the agency's regulations violated due process in their entirety, but only that non-existent price control regulations were unconstitutional as applied to Getty's solvents.

2. There is a Conflict Within The Temporary Emergency Court of Appeals Regarding the Scope of the Agency's Discretion, an Issue That is Important to Administration of the Nation's Energy Laws

The majority's decision below is contrary to and cannot be reconciled with the decisions of other panels of the Temporary Emergency Court of Appeals concerning the agency's discretion to determine what products are subject to its price controls. *See Mobil Oil Corp.* v. *FEA 566 F.2d 87 (T.E.C.A. 1977); Consumers Union* v. *Sawhill,* 512 F.2d 1112, *vacated,* 525 F.2d 1068 (T.E.C.A. 1975); *cf. Marathon Oil Co.* v. *FEA, 547 F.2d 1140 (T.E.C.A. 1976), cert. denied,* 430 U.S. 983 (1977). Now that the agency's discretion is denied by the majority below, the scope of that discretion has become such an important question to the administration of the Nation's energy laws that it should be considered by this Court.

In the *Mobil* case, the issue was whether the agency, in the exercise of its discretion granted by the Emergency Petroleum Allocation Act, could control prices of liquid petroleum products recovered from natural gas wells, including condensate, natural gas liquids and various natural gas liquid products. The

court rejected Mobil's claim that FEA had no jurisdiction over these liquid petroleum products, stating that, "Mobil's construction of FEA jurisdiction under the Act ignores the broad powers and administrative flexibility implied by the comprehensive purposes of the Act." 566 F.2d at 97. Thus, as Judge Zirpoli stated in his dissent, "the basis of the decision in *Mobil* was this court's recognition that Congress intended to grant the agency broad discretion in carrying out its mandate and that *the agency was empowered to decide, subject to judicial review, which products it was necessary to regulate.*" (App., 13a; emphasis added)

In *Consumers Union*, the Temporary Emergency Court of Appeals, *en banc*, upheld FEA's discretion to exempt certain classes of crude oil from price regulation. Read together with *Mobil*, this case thus demonstrates that the agency had the discretion either to control or not to control the price of various products.

In *Marathon*, the issue was whether the agency could require suppliers of petroleum products to continue their normal credit practices. Again, the Temporary Emergency Court of Appeals analyzed the discretionary powers of the agency and "explicitly recognized that the agency has been assigned a task of such enormity that Congress must have intended it to devise a wide range of reasonable means for carrying out its statutory duty." (App., 13a) *See also Condor Operating Co.* v. *Sawhill*, 514 F.2d 351 (T.E.C.A.), *cert. denied*, 421 U.S. 976 (1975).

The majority purported to rely upon *Mobil, Marathon, Consumers Union* and *Condor* to support their determination that certain of the agency's duties were not just discretionary, as those decisions held, but mandatory. But even the agency contended in this case that its decision whether to control solvent prices was discretionary. (*Supra*, at 13-14) No party to this case urged the position that the majority adopted.

Whether the agency has, as it claims, the discretion to interpret the scope of jurisdiction granted to it by Congress is important to the administration of the Nation's energy laws.

The majority's decision denies the existence of any such discretion. Getty respectfully submits that whether or not such discretion exists is such a plainly important issue that it should be considered by this Court.

3. This Court Should Decide the Novel Question of Whether Getty was Bound to Abide by Regulations that the Agency Should Have Issued But Did Not

Both the majority and District Court opinions below misapplied existing law to hold that Getty was bound to abide by regulations that the FEA should have issued but did not. In support of this strange but immaterial proposition, the District Court cited cases holding that an agency's regulations are void if they are beyond the scope of its authority. *See Real* v. *Simon*, 510 F.2d 557, 564 (5th Cir. 1975); *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964). It scarcely follows from those cases, however, that if an agency does *not* do what it is supposed to do, then the regulation that the agency *should* have issued can be enforced retroactively. It is one thing to hold that a regulation is void and unenforceable; it is quite another thing to hold that the absence of a regulation was void and therefore enforce the nonexistent regulation.

To the best of Getty's knowledge, it is a novel question whether an agency can enforce a regulation the absence of which was "void". *Consumers Union* relied upon by the majority, actually did not address this question. As Judge Zirpoli stated in his dissent, *Consumers Union* "did not even hint that the agency, having failed to place a ceiling on the price of new oil, could, by virtue of its mandatory duty to do so, retroactively impose such a ceiling and seek to collect the 'overcharges' from every crude oil producer in the country." (App., 12a) *Consumers Union* does illustrate the incredible ramifications of the retroactivity issue, however, by indicating the extent to which the majority's decision will disrupt the entire petroleum industry when applied to other products.

Because of the general importance of the issue to administrative law, particularly as applied to agencies like the Federal Energy Administration and Department of Energy which repeatedly have violated their statutory obligations,[15] Getty respectfully suggests that the propriety of retroactively rewriting regulations, as done by the majority below, should be considered by this Court.

4. The Majority's Decision Will Impede Solutions to the Nation's Energy Problems and Inundate the Federal Courts with Unnecessary Litigation

The majority's decision ushers in a period of uncertainty for every person subject to the agency's regulations. The only fact that is clear from the majority's opinion is that this uncertainty will impede solutions to the Nation's energy problems, generate considerable unnecessary litigation and further burden the federal courts.[16]

The majority held that persons can be held to have violated regulations that did not exist and that it can *retroactively* rewrite the agency's regulations. It is one thing for a company to affirmatively rely upon a governmental regulation and know that if the regulation is declared invalid then its reliance was misplaced. The uncertainty is magnitudes greater where, as the majority held below, regulations can spring out of thin air and retroactively require conduct that had not previously been controlled. What other products, unnamed in the statutes or regulations, may now be subject to retroactive price controls?

At stake are not just pricing policies but the fundamental business plans of the regulated companies. The $3 million that Getty stands to lose as a direct consequence of the majority's

[15] *See, e.g., Standard Oil Co.* v. *FEA*, 453 F. Supp. 203 (N.D. Ohio 1978), *appeal pending; Phillips Petroleum Co.* v. *DOE*, 449 F. Supp. 760 (D. Del. 1978), *appeal pending;* and *Shell Oil Co.* v. *FEA*, 527 F.2d 1243 (T.E.C.A. 1977).

[16] The federal courts have exclusive jurisdiction over all claims arising under the Emergency Petroleum Allocation Act and most of the Nation's other energy legislation.

decision, even though substantial to Getty, is small compared to the cost of capital investments that Getty and other companies must decide whether to make in coming years. For example, a modern refinery large enough to be reasonably efficient costs more than $1 billion to construct. When the economic feasibility of investments of that magnitude are being considered, uncertainties of the kind that the majority opinion generate are enough to deter regulated companies from proceeding.

The inevitable result of this uncertainty is much less private investment than is wise and much more litigation than is necessary. The quest for certainty inevitably will lead regulated persons to the federal courts. The uncertainty that emanates from decisions such as those below will drive them from producing energy into other lines of business.

5. The Majority's Disregard of the District Court's Factual Findings So Far Departs From the Accepted and Usual Course of Judicial Proceedings as to Require the Exercise of this Court's Supervisory Powers

Getty has been held liable for roughly $3 million and faces critical comment from the press and public without ever receiving an opportunity to present its case at trial—either in the federal courts or in the agency. Nevertheless, the Temporary Emergency Court of Appeals felt free to adopt factual "findings" made by the agency and to disregard contrary findings by the District Court. In so doing, the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Sup.Ct.R. 19.1(b).

The theory upon which the Court of Appeals decided the case depended upon factual "findings" made by the agency—without trial—that the District Court rejected. The agency contended that Getty knew or should have known that the FEA's true intention was to control solvent prices. (*Supra*, at 8-12) The District Court disagreed, stating:

> The court does not mean to attribute any degree of bad faith to Skelly for its interpretation of the April 5, 1974 regulation, and *it would agree that "Skelly is not a seer nor can it divine the intent of FEA underlying its own regulatory definitions."* (App., 26a; emphasis added)

The Court of Appeals purported to rely upon the "findings of fact" made by the District Court (App., 2a) but actually reverted to the contrary "findings" made by the agency to justify its decision. Thus, the District Court found that Getty could *not* have determined "the intent of FEA underlying its own regulatory definitions," but the Court of Appeals held that Getty *did* have notice of the agency's intentions:

> the existence of the allocation regulation was adequate and fair notice to the appellant that the solvents in issue were covered products the price of which was regulated. (App., 8a)

As Judge Zirpoli demonstrated, this conclusion was inconsistent not only with the express finding by the District Court but also with the agency's allocation regulations and the understanding of counsel for the agency. (*Supra*, at 9-12; App., 13a-14a)

The proceedings to which Getty has been subjected were completely improper. The majority had no basis for adopting factual findings made by the agency which were not the product of any evidentiary hearing, especially findings contrary to those made by the District Court (also without trial). More fundamentally, if the theory relied upon by the Court of Appeals was correct (*i.e.*, that Getty was bound to follow regulations that it knew or should have known the agency intended to issue), then the case should not have been decided by way of summary judgment. Instead, upon adopting its novel theory, the Court of Appeals should have remanded the action for determination at trial of what Getty knew or should have known.

These are not minor errors. They go to the very foundation of American Jurisprudence. If the Temporary Court of Appeals is to properly perform its functions, in the accepted and usual manner that this Court requires of the regular circuit courts of appeal, then this Court promptly should exercise its power of supervision and reverse the majority's decision.

CONCLUSION

Petitioner Getty Oil Company respectfully submits that a writ of certiorari should issue and that the majority decision of the Temporary Emergency Court of Appeals affirming summary judgment for respondents should be reversed.

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Dated: October 11, 1978

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-14

GETTY OIL COMPANY,

Appellant,

v.

DEPARTMENT OF ENERGY, AND JAMES R. SCHLESINGER, SECRETARY OF ENERGY,

Appellees.

Appeal from the
United States District Court
For The Northern District of Oklahoma

(Argued January 13, 1978 Decided July 18, 1978)

WILLIAM E. WICKENS, with whom William Simon and Frederick S. Frei, Howrey & Simon, Washington, D.C.; Richard J. Dent, Tulsa, Oklahoma and Kathleen A. O'Connor, Los Angeles, California, of counsel, were on the brief for the Appellant.

MARY ANN CLIFFORD, with whom Barbara Allen Babcock, Assistant Attorney General and Dennis G. Linder, Department of Justice, Washington, D.C., were on the brief for the Appellees.

Before BECKER, CARTER and ZIRPOLI, Judges.

BECKER, Judge:

The writing of this opinion was reassigned after the original assignment.

This is an appeal from a final summary judgment granted on motion of the appellees, defendants in the action in the United States District Court for the Northern District of Oklahoma. When the motion of appellees for summary judgment was granted, an order was entered denying the contemporaneous motion of appellant for summary judgment. The findings of fact and conclusions of law of the District Court are stated in a lucid published opinion of The Honorable H. Dale Cook, United States District Judge for the Northern District of Oklahoma. *Skelly Oil Co.* v. *Federal Energy Administration, et al.*, (N.D. Okla. 1977), 448 F. Supp. 16.

We affirm the judgement of the District Court.

Getty Oil Company (Getty) has succeeded to the interests of Skelly Oil Company (Skelly) by merger. Pursuant to Rule 43 F.R. App. P., on the motion of Getty, Getty is hereby substituted as appellant for Skelly.

The original defendants were the Federal Energy Administration (FEA), Frank G. Zarb, Administrator of FEA (Administrator), and Melvin Goldstein, Director Office of Exceptions and Appeals of FEA. Because of creation of the superseding Department of Energy (DOE) and the succession of James R. Schlesinger, Secretary of Energy (Secretary) to Frank G. Zarb, Administrator, DOE is hereby substituted for FEA and James R. Schlesinger, Secretary, is hereby substituted for Frank G. Zarb, Administrator of FEA as appellees herein. Melvin Goldstein, Director of The Office of Exceptions and Appeals is dismissed as a party because his joinder as a defendant below was unnecessary and inappropriate.

The action below was commenced by the filing by Skelly of a "Complaint for Review of Administrative Action and

Declaratory Judgment" (R. 1-38). Defendants filed an answer consisting of three defenses, including failure to exhaust administrative remedies, and a prayer for general relief (R. 74-81). Jurisdiction of the District Court, and of this Court on appeal, is not controverted, and is established.

The materials submitted in support of the motion of appellant for summary judgment (R. 82, 83) consisted of the pleadings, identified documents, and an affidavit of Edward D. Evans, Chief Chemist of Skelly (R. 128-130) with exhibits attached thereto (R. 130-335).

The cross-motions of appellees for summary judgment (R. 133, 134) relied on the pleadings, identified documents, and the affidavits of J. Lisle Reed, then Director of the Office of Oil and Gas of the FEA (R. 189-209) and of Lon W. Smith, then Acting Director of Case Resolution, Office of Compliance of FEA (R. 336-337), with the exhibit attached thereto (R. 338-362) consisting of a judicial opinion.

Appellant filed motions to strike the affidavit of Lon W. Smith (R. 363, 364) and the affidavit of J. Lisle Reed (R. 365, 366) on the generally stated grounds that each contained irrelevant and self-serving testimony, opinions and conclusions, facts not within the personal knowledge of the affiants, and on the general ground that affiants were not competent to testify to the matters in their affidavits if called to testify. In the alternative the District Court was requested to disregard the unspecified "offensive" portions of the affidavits, which alternative request the District Court granted.

THE CLAIM OF APPELLANT FOR RELIEF

In its complaint, Skelly, predecessor of appellant Getty, states that it sold solvents ("Skellysolves") manufactured at its refinery, and purchased by it, during the period from January 15, 1974, until the filing of the complaint on June 1, 1976. These solvents derived from petroleum are described as "relatively pure hydrocarbon fractions derived from further proces-

sing of a hydrocarbon fraction that boils in the range of 80-450 degree Fahrenheit" (Appellant's Br. 3, R. 128-219). This fraction which boils at 80-450 degrees Fahrenheit is admittedly known by the generic name "Naphtha" (Appellant's Br. 3, R. 128, 195). Naphtha is one of several petroleum "distillates" (Appellant's Br. 3, R. 129, 192-193). Appellant contends that "Naphtha" and "Special Naphtha" are "different things" when the terms are used in the petroleum industry, FEA regulations, and federal statutes, and that the term Naphtha excludes special Naphtha solvents such as Skellysolves, the subject of this appeal.

The term "refined petroleum products" is defined in Title 15, U.S.C. § 752(5) of the controlling Emergency Petroleum Allocation Act of 1973 (EPAA) as follows: "... gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel."

In its complaint, Skelly further stated that on January 15, 1974, when the pricing regulations of the Federal Energy Office (FEO), the predecessor of FEA (10 C.F.R. Part 212, § 212.31), became effective, Skelly construed its Skellysolves as covered products and priced them accordingly (R. 3). After FEO amended its definition of covered products, effective May 1, 1974, contained in 10 C.F.R. § 212.31, *supra*, by deleting any reference to the Standard Industrial Classification Manual, Industry Code 1311, Skelly no longer priced its products as covered products (R. 3).

Skelly admitted that on November 4, 1974, it received a Notice of Probable Violation (NOPV) of 10 C.F.R. § 212.82 and § 212.83, resulting from its alleged misconstruction of 10 C.F.R. § 212.31, *supra*. Skelly's administrative contest of this NOPV ensued. On November 24, 1975, FEA issued to Skelly a Remedial Order, finding explicitly that the solvents in issue were "covered products" from May 1, 1974 to January 15, 1975, the period in issue in this action (Appellant's Br. 6, R. 4, 419). An unsuccessful administrative appeal from the merits of the Remedial Order followed.

This Remedial Order required Skelly to refund $2,954,000 and interest to purchasers during that period (Appellant's Br. 6, R. 219). On appeal, the portion of the latter Remedial Order for restitution was remanded for recalculation. Otherwise, Skelly's appeal was denied (Appellant's Br. 6, R. 25-38).

On January 16, 1975, 10 C.F.R. § 212.31 was again amended expressly to include "special naphthas (solvents)" (R. 8, 40 Fed. Reg. 2795).

THE DECISION OF THE DISTRICT COURT

As shown in detail in its published opinion reported in 448 F. Supp. 16, *supra*, the District Court concluded (1) that the Emergency Petroleum Allocation Act of 1973 (EPAA), Title 15, U.S.C. § 751, *et seq.*, covered solvents of appellant in the category of "refined petroleum products"; (2) that the EPAA imposed a mandatory, nondiscretionary duty to promulgate a regulation to allocate and control prices of all products covered by regulation at the time that EPAA was enacted; that, to the extent the amended regulation of April 5, 1974, purported to exempt the solvents in issue without formal action complying with the procedures of Title 15, U.S.C. § 760a, it was void. (The President has since taken formal action under § 760a to except the solvents in question from regulation under the EPAA (Appellant's Br. 6).)

THE ISSUES PRESENTED

In its original brief (page 1) appellant describes the issues presented as follows:

I. Does the Emergency Petroleum Allocation Act of 1973 confer authority upon the Federal Energy Administration to regulate the price of the solvents which are the subject of this appeal?

II. If the Emergency Petroleum Allocation Act of 1973 does authorize the Federal Energy Administration to regulate the price of the solvents which are the subject of this appeal, is that authority mandatory and non-discretionary or implied and discretionary?

III. Did the Federal Energy Administration fail to exercise such authority during the relevant time period and, if so, does that failure preclude a holding that appellant violated the price regulation?

DECISIONS ON THE ISSUES

I and II

Since we agree with the holding of the District Court, and the reasoning employed in reaching its decision, that the EPAA imposed a mandatory non-discretionary duty to regulate the pricing and allocation of the Skellysolves, the issues I and II are resolved in favor of appellees. *Cf. Consumers Union of U.S., Inc.* v. *Sawhill,* (Em. App. 1975), 512 F.2d 1112, *vacated,* 525 F.2d 1068; *Mobil Oil Corporation* v. *Federal Energy Administration,* (N.D. Tex. 1977), 435 F. Supp. 983, *aff'd,* (Em. App. 1977), 566 F.2d 87.

The solvents in issue are clearly within the definition of "refined petroleum products" in § 752 quoted above, which expressly includes "distillates". Title 15, U.S.C. § 752(5). Appellant's argument based on industrial usage of terms is without merit. *Mobil Oil Corporation* v. *Federal Energy Administration, supra.*

The hypertechnical argument that the pricing and allocation of the solvents in issue were somehow exempted from the mandatory coverage of the EPAA is unconvincing and unsupported in the plain language of the EPAA. The intent of Congress expressed in ordinary language prevails. *Mobil Oil Corporation* v. *Federal Energy Administration, supra,* 566 F.2d l.c. 97, 98.

Appellant contends that the definition of "covered products" in the amended price regulation effective May 1, 1974, to January 15, 1975, "exempted" and failed to cover the solvents in issue. Its contention is based on an obvious minor defect in drafting a subordinate definition of "middle distillates" in amended 10 C.F.R. § 212.31 covering pricing "Refined petroleum products." Appellant concedes that the deficiency in the definition was supplied before May 1, 1974, and after January 15, 1975, by reference to "covered product" as any product described in the Standard Industrial Classification Manual, Industry Code 1311 (except natural gas).

Under the controlling decisions of this Court cited above, the statute directing mandatory control of the solvents in issue made any deficiency in the regulation 10 C.F.R. § 212.31 immaterial. The FEO and the FEA had no power to "exempt" any covered products by regulation. The power to exempt products covered by the EPAA was reserved to the President and Congress and required to be exercised in the manner prescribed by § 706a.

We are in full agreement with the District Court on these constructions of the EPAA.

III

The third contention of appellant, that the FEA failed to exercise its statutory authority to regulate the price of the solvents in issue, is without merit. As a matter of law, as concluded above, the FEA was required by the EPAA and Title 15 U.S.C. § 752 thereof, to regulate the price and allocation of the solvents in issue. The regulations must be construed consistently with this statutory duty. *Consumers Union of U.S., Inc.* v. *Sawhill, supra,* 525 F.2d l.c. 1077. The fact that the price of the solvents in issue had been regulated under the now expired Economic Stabilization Act is significant in construing the EPAA and regulations issued thereunder. *Mobil Oil Corporation* v. *Federal Energy Administration, supra,* 566 F.2d

l.c. 89. Further, the allocation of the solvents in issue was clearly covered by the contemporaneous regulations of the FEA. 10 C.F.R. § 211.182. The significance of this is precisely stated by Judge Jameson in footnote 17 of *National Helium Corporation* v. *Federal Energy Administration*, (Em. App. 1977), 569 F.2d 1137, l.c.

> "National acknowledges the existence of allegation [sic] regulations which covered natural gasoline, but contends it cannot be deemed to have had notice of coverage, under price regulations because the two regulatory programs were distinct. Price regulations and allocation regulations, however, derive from the same authority. If National knew of allocation regulations it should have expected the application of price regulations as well."

Under this rule the existence of the allocation regulation was adequate and fair notice to the appellant that the solvents in issue were covered products the price of which was regulated.

Judge Jameson graphically described the difficult conditions under which the regulations were drafted by the Federal Energy Office (FEO) as the expiration date of the Economic Stabilization Act approached. *National Helium Corporation* v. *Federal Energy Administration, supra,* 569 F.2d l.c. 1144. The regulations must be read liberally when drafted under these circumstances.

The question arises: By what regulation was the price of the solvents in issue regulated? The answer is obvious. The price regulation 10 C.F.R. § 212.83 governed the price of all covered products. It was a general price rule in being at all times material in this case, stated fully in understandable narrative and symbolic equations. Appellant priced the solvents in issue under this regulation before May 1, 1974, and after January 15, 1975. Appellant wrongfully failed to price its solvents under the price regulation in the period from May 1, 1974 to January 15, 1975.

Further, appellant relies on principles of due process and equitable estoppel in support of its claim that the judgment of the District Court should be reversed even if issues II and III are ruled in favor of the appellees. We disagree for many reasons. For to approve application of these doctrines in these circumstances would vitiate the intent and mandate of Congress in the enactment of the EPAA, that we and the District Court perceive; would vitiate the doctrine of *Consumers Union of U.S., Inc.* v. *Sawhill, supra;* and would extend the doctrines of due process and equitable estoppel beyond the limits of the law.

There is no violation of due process in imposing price regulation and allocation obligations in the energy emergency or any similar emergency. *Bowles* v. *Willingham,* 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944); *Condor Operating Company* v. *Sawhill,* (Em. App. 1975), 514 F.2d 351. The EPAA and the regulations were not so vague that a due process violation occurred. On this issue the authorities relied on by appellant are inapposite.

While we do not believe the elements of equitable estoppel exist in this record, the doctrine cannot be invoked to avoid duties lawfully imposed by Congress to protect the public interest. *Scott Paper Company* v. *Marcalus Manufacturing Co.,* 326 U.S. 249, l.c. 257, 66 S.Ct. 101, l.c. 105, 90 L.Ed. 47, l.c. 52; *United States* v. *Consolidated Mines & Smelting Co., Ltd.,* (C.A. 9 1971), 455 F.2d 432, l.c. 446-447.

For the foregoing reasons the orders and judgment of the District Court are affirmed.

ZIRPOLI, Judge, Dissenting:

I respectfully dissent. I cannot accept the proposition that the EPAA imposed upon the FEA "a mandatory non-discretionary duty" to regulate the price of the solvents at issue here and that this court therefore need not examine the pricing regulations to determine whether they in fact applied to appellant's product. While I believe that the agency has the authority under the EPAA to regulate the price of solvents, I

consider it wholly impermissible for the agency to contend that, while it may have failed to include such products in its pricing regulations, the price of such products was nonetheless subject to controls since the agency had no right to promulgate regulations that did not include solvents.

The agency's mandatory duty to regulate the price of solvents is presumably found in section 4(a) of the EPAA, 15 U.S.C. § 753(a), which provides in pertinent part:

> [T]he President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in . . . and at prices specified in . . . such regulation.

Having concluded that solvents fall within the scope of the term "each refined petroleum product," the district court merely noted the fact that the statute appears to *require* the President to impose price controls and concluded that the price of solvents was *ipso facto* controlled, without regard to the action taken by the agency.

The majority, in adopting the reasoning of the district court, conveys the impression that the inclusion of solvents within the category of refined petroleum products is a self-evident truth. On the contrary, the *power* of the agency to regulate these products, as distinguished from its duty to do so, was a subject of vigorous dispute by the parties to this appeal. It requires a considerable amount of interpretation to reach the conclusion that solvents should be included within the scope of the statute, and it is questionable whether one would reach that conclusion at all without the benefit of the presumption that great weight is to be accorded the agency's interpretation of its statutory mandate. It is precisely that exercise of agency expertise, its informed discretion, that led the FEA to conclude that solvents should be regulated if the purposes of the EPAA were to be effectuated. The agency itself, prior to the institution of this litigation, clearly considered its regulation of solvents an

exercise of discretion rather than a discharge of ministerial obligation.[1]

[1] The affidavit of J. Lisle Reed, director of the Office of Oil and Gas for the FEA, submitted by the agency to the District Court in support of its motion for summary judgment, makes this obvious:

> During the drafting of the regulations, I paid special attention to determining precisely the scope Congress intended the FEO to give to the term "refined petroleum product" in the EPAA. Section 3(5) defined "refined petroleum product" to include "gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oil and diesel fuel." It was my belief, based on my reading of the legislative history of the EPAA and my knowledge of the petroleum industry generally, that the Congress did not intend this list to be all-inclusive, and that the Congress expected the President to exercise judgment in determining which products Congress intended to have subject to regulation under the EPAA. (R. 205-06).
>
> In addition, when drafting the initial allocation regulations I became convinced that it was necessary to regulate petroleum solvents in order to effectuate several of the statutory objectives in section 4(b)(1) of the EPAA. In particular, while I was drafting portions of FEO's initial mandatory allocation regulations, I was informed by a representative of the Department of Agriculture that shortages of certain solvents . . . were developing and that such shortages threatened to disrupt soy bean oil processing and other food processing industries dependent upon such solvents. I believed that FEO's failure to allocate solvents could have made it impossible for FEO to meet the objective in section 4(b)(1)(C) of the EPAA to maintain agricultural operations and services related directly thereto. (R. 208).

While the EPAA seems to impose a mandatory duty on the President to regulate the price of "each refined petroleum product," the scope of that phrase is so ambiguous as to necessarily invest the agency with a certain amount of discretion in determining precisely what products are subject to regulation. That discretion is not transformed into a mandatory duty merely by virtue of its exercise, particularly when, as Getty contends is the case here, that discretion is sought to be exercised retroactively.

The cases cited by the majority provide little support for the existence of such a mandatory duty in the context of this case. In *Consumers Union of U.S., Inc.* v. *Sawhill*, 512 F.2d 1112 (Em. App. 1975), *vacated*, 525 F.2d 1068 (Em. App. 1975), this court considered the question whether the EPAA imposed upon the agency a mandatory duty to regulate the price of crude oil and whether that obligation was validly discharged by permitting "new oil" to be sold at the market price. In the first opinion of the court, it was held that the agency had failed to perform its duty in setting the price of new oil at the market level. A rehearing *en banc* was granted, however, and this court held that the agency had acted within the scope of its discretion in regulating the price of new oil with reference to the free market.

Even the initial decision in *Consumers Union*, however, did no more than direct the agency to establish a ceiling price. It did not even hint that the agency, having failed to place a ceiling on the price of new oil, could, by virtue of its mandatory duty to do so, retroactively impose such a ceiling and seek to collect the "overcharges" from every crude oil producer in the country.

Mobil Oil Corp. v. *FEA*, 566 F.2d 87 (Em. App. 1977), provides even less support for the majority. *Mobil* upheld the right of the agency to regulate the price of natural gas liquids against the challenge that the EPAA was not intended to apply to such products. This court found natural gas liquids to come within the scope of the term "refined petroleum products," but

there was no indication that the agency was under a mandatory duty to regulate in this area. On the contrary, the basis of the decision in *Mobil* was this court's recognition that Congress intended to grant the agency broad discretion in carrying out its mandate and that the agency was empowered to decide, subject to judicial review, which products it was necessary to regulate.

This court has explicitly recognized that the agency has been assigned a task of such enormity that Congress must have intended it to devise a wide range of reasonable means for carrying out its statutory duty. *See Marathon Oil Co.* v. *FEA*, 547 F.2d 1140 (Em. App.), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 378 (1977). That recognition cannot be squared with the majority's apparent conclusion that the agency's failure to promulgate a particular regulation does not relieve an oil refiner of the duty to follow such non-existent regulation since the agency had no choice but to issue such a regulation.

If the price of solvents was subject to controls during the period of time relevant to this appeal, then those controls must be found in the agency's regulations, not in the agency's assertedly mandatory duty to issue such regulations. While the majority dismisses appellant's attack on the regulations, even the agency concedes that the pricing regulations, by their literal terms and without any need on Getty's part to resort to hypertechnical obfuscation, simply failed to cover solvents. It may well be that the agency *intended* to draft regulations covering solvents, but the plain fact is that it did not do so.

The agency argues, however, that Getty was on notice of the regulation of the price of solvents by virtue of the inclusion of solvents in the allocation regulations.[2] The fact that a certain

[2] Dicta supporting such a proposition may be found in *National Helium Corp.* v. *FEA*, 569 F.2d 1137, 1145 n.17 (Em. App. 1977). *National Helium*, however, dealt with the effect of pricing regulations which, while admittedly vague and ambiguous in their coverage of natural gas liquids, could in fact be read to apply to such products. This court merely noted that, in view of the clear coverage of the

product is covered by the allocation regulations, however, does not lead inexorably to the conclusion that such product is also covered by the agency's pricing regulations. Some products have in fact been intentionally subjected to one set of controls but not the other.[3] More significant, perhaps, since the question before this court is the degree of notice Getty should be presumed to have received from the allocation regulations, is the fact that counsel for neither Getty nor the agency could state with certainty at oral argument whether the pricing and allocation regulations have always been precisely parallel. The agency argues that Getty should have read the regulations as a whole and thus realized that since solvents were subject to allocation controls they were also subject to price controls. Such an argument loses considerable force when counsel for the agency cannot say whether any products have ever been subject to only one set of regulations.

While this court has wisely declined to hold the agency to a standard of "technical absolutism," *California* v. *Simon,* 504 F.2d 430, 439 (Em. App.), *cert. denied,* 419 U.S. 1021, 95 S.Ct. 496, 42 L.Ed.2d 294 (1974), the agency has not been granted carte blanche to ignore required procedures, particularly where such procedures are viewed as essential to the fair treatment of regulated parties. *See Shell Oil Co.* v. *FEA*, 574 F.2d 512 (Em. App. 1978). The agency's failure to include solvents in its pricing regulations for the period of time relevant to this case cannot, in fairness to Getty, be cured in the manner approved by the majority. I would reverse the judgment of the district court.

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products in the allocation regulations, "National ... should have expected the application of price regulations as well." *Id.* Such an expectation may have been reasonable in *National Helium,* where it could be used to cure an ambiguity in the regulations. I fail to see in what manner such an expectation can be attributed to Getty, when the pricing regulations, without ambiguity, simply failed to cover solvents.

[3] Naphthas used as synthetic natural gas feedstocks, for example, are presently subject to allocation but not price controls. 10 C.F.R. § 210.35(d)(1) and (2).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

SKELLY OIL COMPANY,
Plaintiff,

vs.

No. 76-C-238-C

FEDERAL ENERGY ADMINISTRATION, *et al.*,
Defendants.

ORDER

This is an action brought pursuant to the Economic Stabilization Act of 1970 (ESA), Title 12 U.S.C. §1904 note §211, as incorporated by §5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. §2201. Plaintiff, Skelly Oil Company (Skelly) seeks judicial review of a Decision and Order of the Federal Energy Administration, (FEA) Office of Exceptions and Appeals, and a declaration that the regulations of the FEA purporting to control the pricing and allocation of solvents are "improper, illegal and in excess of the agency's authority." Now before the Court are cross-motions for summary judgment, as well as plaintiff's motions to strike certain affidavits filed by the defendants in support of their motion for summary judgment.

Plaintiff has moved to strike the affidavits of Lon W. Smith and Dr. J. Lisle Reed, on the ground that they contain irrelevant testimony, self-serving opinions, conclusions of law and purported facts which are not within the personal knowledge of the affiants. In the alternative, Skelly asks the Court to disregard the "offensive" portions of the affidavits. Motions to strike are not favored, *Vinita Broadcasting Company* v. *Colby,* 320 F. Supp. 902 (N.D. Okla. 1971), and plaintiff's motions are not directed toward any specific portions of the affidavits. The Court has read the affidavits and is of the opinion that they certainly are not completely defective. Therefore, the Court

will consider the affidavits insofar as the testimony contained therein is admissible and will disregard any inadmissible matter. See *Perma Research & Development Co.* v. *Singer Co.*, 410 F.2d 572 (2nd Cir. 1969).

The substantive issues raised by the cross-motions for summary judgment arise from the following undisputed facts. On November 27, 1973, the EPAA, 15 U.S.C. §§751 *et seq.* was enacted. That statute directed the President to promulgate a regulation allocating crude oil, residual fuel oil and refined petroleum products by amount and price. The price of petroleum and certain petroleum products was also being controlled at that time by regulations promulgated by the Cost of Living Council (CLC) pursuant to authority derived from the ESA. The President's authority under the EPAA and the ESA was delegated to the Federal Energy Office (FEO) on December 6, 1973. The FEO first published its pricing regulations on January 15, 1974 in 10 C.F.R. Part 212. The term "covered product" was defined in 10 C.F.R. §212.31 as follows:

> " 'Covered product' means a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911."

At that time, Skelly began to treat its solvents, which are the products at issue in this case, as "covered products" for purposes of the regulation and priced them accordingly. On February 4, 1974, 10 C.F.R. § 212.31 was amended to read as follows:

> " 'Covered products' means a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321 (except ethane) or 2911 (including benzene and toluene, but excluding ortho-xylene, meta-xylene, para-xylene and butadienes), and all forms of benzene and toluene."

Skelly continued to price its solvents in accordance with this regulation. On April 5, 1974, 10 C.F.R. § 212.31 was again amended by the FEO to read as follows:

> " 'Covered products' means crude oil, residual fuel oil and refined petroleum products."
>
> "Refined petroleum product" was defined at that time as follows:
>
> 'Refined petroleum product' means gasoline, kerosene, middle distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel."

Skelly determined that its solvents did not fall within this definition of "covered products", and effective May 1, 1974, Skelly began to price its solvents as non-covered products. In June 1974, pursuant to the Federal Energy Administration Act of 1974, the FEA was created and assumed the regulatory duties previously exercised by the FEO. On October 31, 1974, the FEA issued a Notice of Probable Violation (NOPV) to Skelly, in which it took the position that solvents remained "covered products" under the April 5, 1974 amendments to the regulations and that Skelly was in violation of the regulations by treating its solvents as non-covered after May 1, 1974. On November 12, 1974 Skelly filed with the FEA its reply to the NOPV, in which it made essentially the same arguments now urged upon this Court. On January 16, 1975, 10 C.F.R. § 212.31 was again amended to read as follows:

> " 'Covered products' means aviation fuels, benzene, butane, crude oil, gas oil, gasoline, greases, hexane, kerosene, lubricant base oil stocks, lubricants, naphthas, natural gas liquids, natural gasoline, No. 1 heating oil and No. 1-D diesel fuel, No. 2 heating oil and No. 2-D diesel fuel, No. 4 fuel oil and No. 4-D diesel fuel, propane, residual fuel oil, special naphthas (solvents), toluene, unfinished oils, xylene, and other finished products. A blend of two or more

> particular covered products is considered to be that particular covered product constituting the major proportion of the blend."

Following this amendment, Skelly once again began to price its solvents as covered products. On November 24, 1975, the FEA issued a Remedial Order to Skelly, in which it again found that solvents were "covered products" between May 1, 1974 and January 14, 1975. Skelly was ordered to refund to purchasers of its solvents during that time period a total of approximately $2,594,000.00, plus interest. On December 4, 1975, Skelly filed with the FEA its appeal from the Remedial Order. The appeal was denied in all material respects by the FEA's Office of Exceptions and Appeals on March 19, 1976. It is this decision by the FEA which Skelly now asks this Court to review.

In considering the validity of the regulation in question, this Court is limited to a determination of whether the regulation is in excess of FEA's authority under the EPAA, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in Title 5 U.S.C. § 706(2). *Air Transport Association of America* v. *Federal Energy Office*, 382 F. Supp. 437 (D.C. 1974), affirmed 520 F.2d 1339 (Em. App. 1975). Skelly's first contention is that the FEA does not have the statutory authority under the EPAA to regulate the pricing of solvents. Such authority, if it exists, would arise from Title 15 § 753(a), which provides in pertinent part as follows:

> ". . . [T]he President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product. . . ."

Title 15 § 752(5) defines "refined petroleum product" as follows:

> "The term 'refined petroleum product' means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel."

All parties agree that if solvents are within the scope of the EPAA, it would be as "refined petroleum products", and further as "distillates". The issue is therefore whether Congress intended the term "distillates" to encompass solvents.

In interpreting the authority granted by the EPAA, Title 15 U.S.C. § 753(a) must be read together with the objectives which the exercise of that authority is to accomplish. *Cities Service Company* v. *Federal Energy Administration*, 529 F.2d 1016 (Em.App. 1975). This is merely an extension of the well-settled doctrine that a statute should be read, " . . . assuming that is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro* v. *United States*, 335 U.S. 1, 31, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), rehearing denied 335 U.S. 836, 69 S.Ct. 9, 93 L.Ed. 388 (1948). See also *Shultz* v. *Louisiana Trailer Sales, Inc.*, 428 F.2d 61 (5th Cir. 1970), *cert. denied*, 400 U.S. 902, 91 S.Ct. 139, 27 L.Ed. 2d 139 (1970). The major purpose of the EPAA is expressed in Title 15 U.S.C. § 751(b), which provides:

> "The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy."

This purpose is to be accomplished through regulations, which Congress intended to provide for:

> "(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual

homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintcnance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of —

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." Title 15 U.S.C. § 753(b)(1).

The legislative history of the EPAA, as well as the language of the Act itself, are the best indications of the intent of Congress regarding the scope of the EPAA. Skelly does not seriously contend that solvents are not refined from petroleum; rather, its argument is based primarily upon technical definitions of "distillates", under which it contends solvents do not fall. (See affidavit of Edward D. Evans). However, Congress expressly rejected such technical restrictions on the definition of "distillates".

> "Special mention should be made of the term "refined petroleum product" which is taken from the House amendment. This term is defined to mean kerosene, gasoline, distillates (including Number 2 fuel oil), LPG (as further defined to mean propane and butane), refined lubricating oils, or diesel fuel. . . . It is understood that the term "distillates" when applied in a technical sense would encompass only Numbers 1, 2, and 4 fuel oils. It is the committee's intent, however, that this term also reach to include naptha (sic) and benzene so as to require the allocation of these products as may be necessary to accomplish the objective of restoring and fostering competition in the petrochemical sector of industry. In this respect the conference committee wishes to emphasize that, in expressing congressional concern with fostering competition in the petrochemical industry, the committee intends to also identify petrochemical feedstock needs as important end-uses for which allocation should be made."
>
> Conference Report 93-628, 1973
> U.S. Code Cong. & Admn. News, p. 2693.

Skelly argues that Congress did not intend the terms "naphtha" and "benzene" to include solvents because those substances "generally" or "most commonly" have other uses. (See affidavit of Edward D. Evans). However, even a cursory review of industry and lay publications indicates that those terms are commonly understood to include solvents. *Webster's Third New International Unabridged Dictionary* (1971) defines "naphtha" as "any of various volatile often flammable liquid hydrocarbon mixtures used chiefly as solvents and diluents and as raw materials for conversion to gasoline." "Benzene" is also defined as having a chief use as a solvent. In *Guthrie, Petroleum Products Handbook* (1st ed. 1960), "naphtha" is defined as "[l]iquid hydrocarbon fractions, generally boiling within the gasoline range, recovered by the distillation of crude petroleum. Used as solvents, dry-cleaning agents, and charge stocks to reforming units to make high-octane gasoline." The same term is defined in *Langenkamp, Handbook of Oil Industry Terms and Phrases* (1974) as "[a] volatile, colorless liquid obtained from petroleum distillation; used as a solvent in the manufacture of paint, as dry-cleaning fluid, and for blending with casinghead gasoline in producing motor gasoline." The terms "naphtha" and "solvent" are used interchangeably in *Nelson, Petroleum Refining Engineering* (4th ed.). The EPAA itself provides, in Title 15 U.S.C. § 753(a), that the mandatory allocation shall extend to "*each* refined petroleum product." The Conference Committee emphasized the all-inclusive scope of the products intended to be regulated when it said:

> "It is the Committee's understanding that an allocation program, if it is to work at all, must be comprehensive in scope and therefore must include the major refined components of a barrel of crude oil." *Id.* at 2697.

Skelly has, through the affidavit of its chief chemist, described the importance of its solvents to the national economy.

> "Skellysolves are used by many industries in a variety of ways. They are used in the vegetable oil extraction industry for extracting materials such as soybean oil, cottonseed oil, and other edible and non-edible oils and greases. The pharmaceutical industry uses Skellysolves in the extraction of vitamins and hormones and as solvents for certain edible waxes. Some Skellysolves are sold as laboratory reagents for a variety of laboratory applications. The rubber industry uses Skellysolves for rubber solvents, special rubber cements and for chemical processing applications. These solvents are also used for such applications as the preparations of sealants for cans, adhesives for home and industrial tapes, printing inks, home and industrial wax preparations, polishes and cloth impregnation chemicals. The paint and varnish industry uses a number of Skellysolves for thinners and diluents. Skellysolves are also used in the dry cleaning industry and for metal and tool cleaning and degreasing .... [T]hey are favored for industrial applications such as oil extraction, chemical processing and dry cleaning." Affidavit of Edward D. Evans at p. 2-3.

Based upon the Congressional declarations of the comprehensive nature of the products covered by the EPAA, the existence of definitions of "naphtha" and "benzene", available to Congress at the time the Act was passed, which indicate that those products are used as solvents, and Skelly's own statements as to the importance of solvents to the national economy, this Court has concluded that the major purpose and goals of the EPAA would clearly be advanced by a construction of the Act which places solvents in the category of "refined petroleum products" and that such purpose and goals would be frustrated by attributing to Congress a contrary intent. It is therefore the determination of the Court that solvents are covered by the mandatory allocation provisions of Title 15 U.S.C. § 753.

Skelly argues that "[i]f FEA had the authority to regulate solvents during the period April 5, 1974, to January 16, 1975, it

expressly failed to exercise such authority . . . . " Skelly initially recognized the FEA's "authority" to regulate solvents, and it priced its solvents as "covered products" beginning with the January 15, 1974 regulations. However, it contends that with the amendment of April 5, 1974, the FEO removed solvents from the list of "covered products" and in effect exempted them until January 16, 1975, when Skelly again began pricing its solvents as "covered products". By construing the FEA's responsibility under the EPAA as "authority to regulate", Skelly has misinterpreted the Act. Title 15 U.S.C. § 753(a) provides that " . . . the President *shall* promulgate a regulation providing for the *mandatory* allocation . . . "of the relevant products, in this case solvents. The Act thus imposes a mandatory, nondiscretionary duty to promulgate a regulation allocating petroleum products. *Consumers Union of United States, Inc.* v. *Sawhill*, 512 F.2d 1112 (Em.App. 1975), vacated on other grounds 525 F.2d 1068 (Em.App. 1975). This duty extends to all products covered at the time the EPAA was enacted, including solvents. Products can be exempted from the coverage of the act only by Congress after the procedures specified in Title 15 U.S.C. § 760a have been complied with. Those procedures include a Presidential finding that such exemption will not have an adverse impact on the supply or price of any petroleum product and will not be inconsistent with the attainment of the stated objectives of the Act. There is no contention in this case that such a procedure was utilized to exempt solvents from the coverage of the EPAA. It is well settled that the authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations, and that regulations which exceed Congressional authority are void. *Real* v. *Simon*, 510 F.2d 557 (5th Cir. 1975), rehearing denied, 514 F.2d 738 (5th Cir. 1975); *Federal Maritime Commission* v. *Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964). Thus, to the extent that the FEO's regulation of April 5, 1974 purported to exempt solvents from the EPAA without complying with Title 15 U.S.C. § 760a, it was in excess of Congressional authority and therefore void.

See *Consumers Union of United States, Inc.* v. *Sawhill, supra.* In its Memorandum in Support of its Motion for Summary Judgment, Skelly twice recognizes the possibility that the purported exemption was unlawful:

> "It appears that FEA further reasons that solvents, had they been exempted by the April 5 amendment, should have, *a fortiorari*, appeared in the list in Section 210.34(a) as exempt products. If this were not the case, then FEA would have, by its own words, unlawfully exempted solvents from the coverage of its pricing regulations. Skelly suggests that not only is this observation fully within the realm of possibility, but it probably is an apt characterization of what actually occurred." Skelly Memorandum, p. 25.

> "It appears to Skelly that in the confusion surrounding the transition from those products regulated under the ESA to those regulated under the EPAA, solvents were deleted from the definition of the term "covered products". Perhaps this omission, as FEA suggests, did result in an unlawful exemption of solvents from FEA's pricing regulations. In any event, solvents were no longer covered products for the purposes of FEA's pricing regulations." *Id.* at p. 26.

Because solvents are within the scope of the mandatory allocation provisions of the EPAA, the FEO and FEA had the non-discretionary duty to include them in their definitions of "covered products". Solvents were so included in the first regulations, issued January 15, 1974, and Skelly priced its solvents as "covered products" at that time. Assuming, as Skelly contends, that the FEO's regulation of April 5, 1974 could be interpreted as entirely excluding or exempting solvents from its coverage, such exemption was in excess of the FEO's authority and therefore void. The purported exemption being void, it is clear that solvents remained, as a matter of law,

"covered products" between April 5, 1974 and January 16, 1975. Therefore, Skelly was incorrect in treating its solvents as non-covered products during the period of May 1, 1974 to January 14, 1975. The Court does not mean to attribute any degree of bad faith to Skelly for its interpretation of the April 5. 1974 regulation, and it would agree that "Skelly is not a seer nor can it devine the intent of FEA underlying its own regulatory definitions." The Court has not found it necessary to weigh the merits of the conflicting interpretations because it has determined as a matter of law that the FEO and FEA had a duty to treat solvents as "covered products" in the absence of compliance with the statutory exemption procedures defined in Title 15 U.S.C. § 760a. The Remedial Order which is the subject of this review does not attempt to punish Skelly for its interpretation of the April 5, 1974 regulation; it merely seeks from Skelly a refund of the moneys it would not have received had the FEO and FEA clearly and correctly followed the mandates of the EPAA. The Court is not expressing any opinion regarding the merits of any possible future action for civil or criminal penalties brought against Skelly based upon an alleged violation of the April 5, 1974 regulation.

For the foregoing reasons,

IT IS ORDERED that the plaintiff's motions to strike are overruled.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment is overruled and the defendants' motion for summary judgment is sustained.

It is so Ordered this 8th day of September, 1977.

/s/ H. Dale Cook

H. DALE COOK
United States District Judge

DECISION AND ORDER OF THE FEDERAL ENERGY ADMINISTRATION

Appeal

Name of Petitioner: Skelly Oil Company
Date of filing: December 12, 1975
Case Number: FEA-0686

On December 12, 1975 the Skelly Oil Company (Skelly) filed an Appeal from a Remedial Order which the Regional Administrator of Region VI of The Federal Energy Administration issued to the firm on November 24, 1975. In the Remedial Order the Regional Administrator found that during the period May 1, 1974 through January 14, 1975 Skelly acted improperly by failing to treat certain solvents which it refined and sold as covered products for purposes of the FEA Mandatory Petroleum Price Regulations. According to the Remedial Order Skelly sold the solvents at prices which were in excess of the maximum permissible selling prices calculated pursuant to Sections 212.82 and 212.83 of the Mandatory Petroleum Price Regulations. In order to remedy the violations and overcharges found to exist the Regional Administrator directed Skelly to refund within 45 days of the issuance of the Order approximately $2,594,000.00, plus interest, to firms which purchased solvents from Skelly during the period of the violation. The remedial Order also directed Skelly to prepare and maintain records which indicate the manner in which the firm complies with the refund requirement. Skelly's Appeal, if granted, would result in a rescission of the November 24 Remedial Order.

On December 17, 1975 FEA Region VI stayed the refund requirement pending a determination of the Skelly Appeal.

I. Statutory and Regulatory Basis for the Remedial Order

Section 4(a) of the Emergency Petroleum Allocation Act of 1973 (the EPAA) directs that

> ". . . the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual

> fuel oil and each refined petroleum product . . . at prices specified in . . . such regulation."

As defined in Section 3(5) of the EPAA the term "refined petroleum products" means " . . . gasoline, kerosene, distillates, (including Number 2 fuel oil), LPG, refined lubricating oils or diesel fuel." In the Conference Report accompanying the EPAA, the Congress stated that the term "distillates" used in the definition of refined petroleum product should " . . . also reach to include naphtha and benzene so as to accomplish the objective of restoring and fostering competition in the petrochemical sector of the industry." House Report 93-628 (November 10, 1973) P. 16. The Congress therefore directed the FEA to broadly construe the term "refined petroleum products" to include products produced in petroleum refining which are not specified in the technical definitions of the items. [Since solvents are refined from crude oil in a manner analogous to naphtha and other distillates and share many physical characteristics of those products, the FEA determined that solvents fall within the scope of products to which the Act refers.]

In order to effectuate the requirements of the EPAA, the FEA promulgated the Mandatory Petroleum Allocation and Price Regulations on January 16, 1974. Section 212.83 of those Regulations specifies the basic method which all refiners of crude oil and refined petroleum products must use to reflect the crude oil cost increase which they incur in the prices of the covered products which they sell. That provision generally provides that a refiner may recover through its sales of covered products no more than the portion of its increased crude oil costs which the volume of the covered products it sells bears to the total volume of all products refined from petroleum which it sells, subject to special provisions for propane and motor gasoline.

When the Mandatory Petroleum Price Regulations were first promulgated, the term "covered products" was defined in 10

CFR 212.31 to mean " . . . a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code . . . 2911 . . . (39 F.R. 4466, February 4, 1974)." SIC Code 2911 includes "naphtha produced in petroleum refineries" and "solvents produced in petroleum refineries." However, shortly before the Economic Stabilization Act of 1970 expired, certain petroleum-based products, including asphalt, road oil, refinery gas, petroleum wax and petroleum coke, which had previously been subject to price regulation under the provisions of that Act, were specifically exempted from the FEA Price control regulations.[4] As a consequence, the definition of the term "covered products" in 10 CFR 212.31 was also amended on April 5, 1974 to provide that:

> 'Covered products' means crude oil, residual fuel oil and refined petroleum products.[5]

This definition reiterated the language in Section 4(a) of the EPAA which defined the products for which the FEA was required to establish price and allocation regulations. In explaining the reasons underlying the April 5, 1974 regulatory amendments the FEA stated:

> . . . the authority under the Emergency Petroleum Allocation Act of 1973 only extends to crude oil, residual fuel oil and refined petroleum products. Certain products such as asphalt, road oil refinery

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[4] Section 210.34(b) provides that:

> Petroleum refinery products such as petroleum wax, petroleum coke, asphalt and road oil which are not crude oil, refined petroleum products, or residual fuel oils are exempt from the provisions of Parts 211 and 212 of this chapter.

[5] On April 5, 1974 the term "refined petroleum products" was defined in 10 CFR 212.31 as " . . . gasoline, kerosene, middle distillates (include No. 2 fuel oil), LPG, refined lubricating oils, or diesel fuel." The term "middle distillates" was defined as " . . . Nos. 1 and 2 heating oils, Nos. 1-D, 2-D and 4-D diesel fuels, No. 4 fuel oil, kerosene and aviation turbine fuel."

gas, petroleum wax and petroleum coke are not subject to the provisions of the Allocation Act. Previously, prices of these products have only been controlled under the authority of the Stabilization Act.

Because the Economic Stabilization Act expires on April 30, 1974 and because the Cost of Living Council has decontrolled the prices charged for related products such as asphalt which is not produced in refineries, the FEO is amending the definition of "covered products" in its price regulations to conform to the substances over which it has price regulation authority under the Allocation Act. Therefore, "covered products" is now defined to mean crude oil, residual fuel oil, and refined petroleum products. Since the products which are decontrolled by this action have never been within the scope of the Allocation Act, it is not necessary to comply with the procedures under Section 4(g) of that Act for exempting products from FEO regulations. 39 Fed. Reg. 12,353 (April 5, 1974)

On January 16, 1975 the FEA again amended the term "covered products" to enumerate with greater specificity the products to which that definition refers. The new definition stated:

> "Covered products" means aviation fuels, benzene, butane, crude oil, gas oil, gasoline, greases, hexane, kerosene, lubricant base oil stocks, lubricants, naphthas, natural gas liquids, natural gasoline, No. 1 heating oil and No. 1-D diesel fuel, No. 2 heating oil and No. 2-D diesel fuel, No. 4 fuel oil and No. 4-D diesel fuel, propane, residual fuel oil, special naphthas (solvents), toluene, unfinished oils, xylene, and other finished products. A blend of two or more particular covered products is considered to be that particular covered product constituting the major proportion of the blend. 40 F. R. 2795 (January 16, 1975)

II. Factual Background of the Present Case

Skelly is a major integrated oil company and maintains crude oil production, refining and marketing operations throughout the Midwestern United States. As a result of its refining activities, Skelly is considered a refiner as that term is defined in 10 CFR 212.31 and is required to sell covered products at price levels which do not exceed the maximum price levels specified in Section 212.83 of the Mandatory Petroleum Price Regulations.

As part of its refining and marketing activities, Skelly produces and sells eleven commercial and industrial solvents. Prior to April 5, 1974 Skelly calculated the maximum permissable selling prices for the solvents which it sells pursuant to the regulatory provisions applicable to covered products set forth in Section 212.83. However, after the definition of the term "covered products" set forth in Section 212.31 was amended on April 5, 1974 Skelly considered that solvents were no longer covered products and the firm began to sell solvents at prices which exceeded the maximum permissible price levels which would have been computed if it had adhered to the pricing formulae specified in the FEA Price Regulations. Skelly followed this practice until January 16, 1975 when the definition of the term "covered products" was amended to specifically include "special naphthas (solvents)". At that time Skelly again began pricing solvents in accordance with the price regulations applicable to covered products.

The Remedial Order which the Regional Administrator issued to Skelly on November 24, 1975 was primarily based on the determination that the definition of the term "covered products" in 10 CFR 212.31 always included "solvents." The Order further determined that Skelly's failure to consider solvents as

covered products under the regulatory provisions in effect between April 5, 1974 and January 16, 1975 was erroneous and illegal.

III. Skelly's Appeal

In its Appeal from the Remedial Order Skelly contends that the FEA lacks the statutory authority to regulate the prices at which it sells solvents. Skelly states that the solvents which it sells are not "naphtha" as that term is defined in the *1973 Annual Book of ASTM Standards* and are therefore excluded from the definition of refined petroleum products which appears in Section 3(5) of the EPAA.

There is no merit to this position. As stated above, the EPAA Conference Committee Report indicates that the Congress declined to apply a narrow technical meaning to the term "refined petroleum products" or to the products which are specified in the definition of that term. Moreover, the Committee directed that those terms be broadly construed in order to insure that the regulatory program applied in a comprehensive manner. Solvents share similar physical and chemical characteristics with gasoline, kerosene and distillates and solvents, like those products, must be produced to precise quality standards in relatively sophisticated refining facilities. As a result, any substantial alteration in the proportion of solvents which refiners produce from their crude oil supply might directly affect production volumes for those other products. On the other hand, exempt products such as asphalt, petroleum coke and refinery gas are generally produced as heavy ends or as residues from other more desirable products and it is doubtful that a refiner would increase the production of these products and reduce its output of covered petroleum products. Thus, it is apparent that solvents must be included within the allocation and price regulatory program which the EPAA required in order to insure the comprehensive scope and effectiveness of that Program. Skelly has not demonstrated that this determination is erroneous or otherwise an abuse of the

FEA's administrative discretion. *See, Pasco* v. *FEA*, Emergency Ct. of Appeals, 2 FEA Par. 26,248 (October 14, 1975).

Skelly also contends that even if the EPAA delegates to the FEA the authority to regulate the selling prices of solvents, the FEA regulations in effect between April 5, 1974 and January 16, 1975 failed to implement that authority because solvents were not included within the Section 212.31 definition of those "covered products" which are subject to the pricing regulations. As indicated above, covered products were at that time defined in Section 212.31 as " . . . refined petroleum products," which were in turn defined in Section 212.31 to mean " . . . gasoline, kerosene, middle distillates (including No. 2 fuel oil), LPG, refined lubricating oils, or diesel fuel." Middle distillates were defined in Section 212.31 as "Nos. 1 and 2 heating oils, Nos. 1-D, 2-D and 4-D diesel fuels, No. 4 fuel oil, kerosene and aviation fuels."[6]

Skelly contends that the definition of "refined petroleum products" quoted above deviates from the statutory definition by substituting the narrow technical term "middle distillates" for the statutory term "distillates." Skelly further contends that the regulatory definition of the term "middle distillates" does not describe or apply to solvents and that no other petroleum product included within the scope of the term "refined petroleum products" applies to solvents. Skelly also asserts that the definition of the term "middle distillates" in Section 211.51 specifically excluded "solvents" and that it was reasonable under the circumstances for the firm to have concluded that the FEA applied the same exclusion to the Part 212 definition. Skelly therefore contends that solvents were not covered products subject to the FEA Price Regulations and asserts that it was therefore lawful for the firm to determine the prices of solvents without regard to the limitations set forth in Part 212.

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[6] Prior to July 2, 1974 the term "aviation turbine fuel" was used instead of the term "aviation fuels."

We have thoroughly considered the arguments which Skelly has presented and have determined that Skelly has failed to demonstrate that the FEA regulations did not extend to solvents. As indicated above, the EPAA directs the FEA to regulate the allocation and price of refined petroleum products and solvents are among the products covered. Although the FEA regulatory definition used the term "middle distillates" rather than the term "distillates" as stated in Section 3(5) of the EPAA, it should have been clear to Skelly that solvents were among the products to which the FEA regulatory authority continued to apply. First, the statement in the preface to the April 5 Rulemaking noted that the FEA's regulatory authority would continue to be applied to all products covered by the EPAA and that the definition of the term "covered products" in Part 212 was designed to encompass all products included in the definition specified in Section 3(5) of the EPAA. 39 Fed. Reg. 12,353 (April 5, 1974). Moreover, solvents were at that time subject to allocations pursuant to Part 211, Subpart J (Naphthas and Gas Oils) and Skelly itself states that it has continuously regarded solvents as allocated products for the purposes of Part 211. Since Part 211 and Part 212 of the Regulatory Program serve different functions it is not unusual for products to be classified differently in each part.

In addition, Section 4(g)(2) of the EPAA required that the FEA submit to the Congress for its consideration any proposal to exempt a product from the regulatory program before such a proposal could become effective. Since the FEA in no way initiated proceedings pursuant to Section 4(g)(2) of the Act to exempt solvents from the coverage of the regulatory program, it should have been clear to Skelly that the FEA never intended that result. Accordingly, the determination of the Remedial Order that solvents were covered products during the period April 5, 1974 through January 16, 1975 is correct. Skelly was therefore required to sell those products at price levels which do not exceed the maximum permissible price level calculated pursuant to the provisions of 10 CFR, Part 212.

IV. The Findings of Fact and Cor lusions in the Remedial Order

After establishing that solvents are covered products whose selling prices were governed by the applicable provisions of the Mandatory Petroleum Price Regulations, the FEA further determined in the Remedial Order that during the period May 1, 1974 through January 14, 1975 Skelly obtained approximately $2,594,000.00 by selling solvents at prices which exceeded the maximum permissible levels. The Remedial Order determined the amount of the violation on the basis of the following computation:

Increased crude oil costs which Skelly recovered during this period from the sale of solvents	(approximately $5,143,000.00)
Less the maximum increased crude oil costs which Skelly is permitted to recover in the price charged for solvents during this period	(approximately $2,819,000.00)
	(approximately $2,594,000.00)

The Remedial Order also contained an Appendix (Schedule A) which apportioned these computations on a monthly basis. In order to remedy this violation and compensate Skelly's solvent customers for the overcharges which they experienced, the Remedial Order directs Skelly to take the following action within 45 days:

> (1) Refund, to purchasers of Skelly's solvents between May 1, 1974 and January 14, 1975, by check or credit memorandum at the purchaser's option, each customer's share of the amounts shown as "over-recovery" for each month on the attached Schedule A. Each customer's share for a month shall be determined by dividing the amount shown as "over-recovery" for that month by the total

volume of solvents sold in that month, and multiplying that amount by the volume of solvents purchased by that customer in that month.

(2) Pay to each customer for whom a refund is calculated pursuant to this Order, and in a manner consistent therewith, interest calculated at 6% per annum for each monthly amount of refund to that customer for the number of months between the first day of the month for which such refund is due and July 1, 1975, and calculated at 9% per annum between July 1, 1975 and the date on which the refund for that month is made.

(3) Resubmit to FEA, Forms FEO-96 for months subsequent to May 1974 to reflect the allocation and recovery of a total of approximately $2,819,000 in sales of solvents as covered products of the type "i = 3" (pursuant to 10 CFR §212.83), by correcting each monthly resubmitted form in the amount shown as "recovery" on Schedule A. Forms FEO-96 resubmitted for January 1975 as the "month of measurement" shall further include an adjustment for actual revenues recovered in sales of solvents by Skelly for the period January 1, through January 15, 1975.

The Remedial Order also directed Skelly to: inform each firm which receives a refund or credit that such action is taken in compliance with the provisions of the Order; prepare and maintain records which demonstrate Skelly's compliance with the profit margin limitations set forth in 10 CFR 212.121 during each fiscal year completed since May 1974; prepare and maintain records of payments and credits made in compliance with the Order which indicate customers name and address, dates of transactions for which refund is made, the dollar amount of refunds and date and form of refund; and comply with the provisions of 10 CFR 212.82 and 212.83 regarding costs and revenues attributable to solvents sold by Skelly as described in the Order.

In its Appeal Skelly challenges the propriety of these requirements on the grounds that the findings of fact which support them are allegedly incomplete, vague, incorrect and unsupported by substantial evidence. Skelly asserts that the FEA has failed to make specific findings regarding the precise amount of the alleged overcharge and the precise amount which it is required to refund to each customer and that this occurs because the FEA did not obtain substantial evidence in the investigatory phase of this proceeding to support explicit factual findings. The firm further asserts that the Remedial Order is therefore improperly being used as a discovery device to compensate for the evidentiary and factual deficiencies of the record. Skelly contends that this situation deprives it of an opportunity to construct any meaningful Appeal of the Remedial Order in contravention of its right to due process. Skelly additionally claims that the refund requirements of the Remedial Order are improper and arbitrary because they do not require Skelly to remit to each customer the precise amount of the overcharge to that particular customer. In order to remedy the alleged deficiencies in the Remedial Order, Skelly asserts that the FEA should be required to indicate the total precise amount of any alleged overcharge, and calculate the overcharge imposed in each sale of each product to each specific customer. Skelly also claims that each such calculation must indicate the May 15, 1973 selling price of each product to each particular class of customer and the maximum permissible increased crude oil costs allocable to each product in each month.

After considering Skelly's contentions in this matter, we have concluded that the Remedial Order generally satisfies applicable due process requirements. However, the Order does contain certain technical deficiencies which should be corrected upon a remand to the Regional Administrator. For example, the Remedial Order contains an attachment which sets forth only the approximate amount of funds which Skelly recovered each month by selling solvents at prices which exceeded

maximum permissible levels. Even though the Order itself does not specifically indicate the manner in which the overcharges stated were computed or the sources of the data upon which the FEA relied in making those computations, the compliance file in this proceeding does indicate that the computations were derived from data which Skelly itself submitted on a regular basis to the FEA as a supplement to the firm's filing of Form FEA-96. The FEA may certainly rely upon data provided in these submissions to reach the determination that Skelly overcharged its customers. Nevertheless, the FEA is required to inform Skelly of the source of the data which it utilizes in order to provide the firm the opportunity to contest the accuracy of reliability of the material or to otherwise explain why reliance upon this information is inappropriate. The Remedial Order should therefore be amended to satisfy this requirement.

Skelly also claims that the Remedial Order must state the precise amount of the overcharge attributable to each product in each month and that in order to do so the Order must also establish the proper base price for each product sold to each class of customer. There is no merit to this position. As indicated above, Skelly itself informed the FEA that it failed to consider solvents as covered products during the period April 5, 1974 through January 16, 1975. The FEA found its failure to do so resulted in a situation in which Skelly charged purchasers of solvents prices which exceeded the maximum levels specified in the FEA Price Regulations and thereby resulted in a violation of those regulations. Moreover, the data which Skelly provided to the FEA makes a *prima facie* showing that the crude oil cost increases which Skelly recovered in the sale of solvents exceeded the maximum amounts allocable to those products. Under these circumstances there is clearly substantial evidence to support the determination that a violation occurred and additional findings as to the propriety of Skelly's base price computations and class of purchaser determinations are not necessary to support the basic determination that a violation has occurred.

There are a number of procedures available through which the FEA compliance staff can establish the precise extent of the violation. Under the provisions of Section 205.200 the FEA can subpoena data which would permit it to calculate the overcharges itself. The FEA can also require Skelly to calculate the overcharges and submit a special report pursuant to Section 210.91 in which it does so. However the Remedial Order which was issued in this proceeding did not utilize either of these procedures and instead requires Skelly to proceed to make refunds based on approximate price data which was submitted to the FEA in another context over a year earlier. The Remedial Order should accordingly be modified and a mechanism established which will result in a more precise computation of the overcharges which should be refunded.

The record in this proceeding indicates a further defect in the Remedial Order which should be corrected on remand. The covered products which are the subject of the Remedial Order consist of eleven different solvents, each of which have different base prices. The cost increases which must be attributable to each of these products in establishing maximum selling prices are also different. However no such distinction is made in the Remedial Order. Skelly is instead ordered to make refunds on the basis of a single volumetric computation of all eleven products. This approach could well be justifiable if the separate computations would be so burdensome as to outweigh the advantages derived from differentiating each of the eleven solvents. However no findings to this effect appear in the Remedial Order; nor is there any discussion whatever as to why the approach was adopted of combining by volume all of the eleven separate covered products in the refunds which Skelly was required to make. This issue too should be addressed in the revised Remedial Order which the Regional Administrator issues on remand.

In view of the considerations set forth above, the Federal Energy Administration has determined that the Remedial Order which was issued to the Skelly Oil Company on Novem-

ber 24, 1975 should be remanded to the Regional Administrator of FEA Region VI for further findings of fact and conclusions in accordance with the principles set forth in this Decision.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal which the Skelly Oil Company filed from a Remedial Order issued to it on November 24, 1975 by the Regional Administrator of FEA Region VI be and hereby is granted to the extent set forth in Paragraph (2) below.

(2) This matter is hereby remanded to the Regional Administrator of FEA Region VI. The Regional Administrator shall issue a revised Remedial Order which:

(a) Identifies the data which the FEA relied upon in computing the extent of Skelly's overcharge;

(b) Establishes a mechanism to compute the precise amount of Skelly's overcharge; and

(c) Determines whether Skelly should be required to compute the precise overcharge attributable to each product. If Skelly is required to undertake such computations, the revised Remedial Order must also indicate the standards and criteria which should be applied and must establish a mechanism to compute the precise amount of the overcharge for each product in each month.

(3) Except as set forth in Paragraph (2) above, the Remedial Order issued to Skelly is affirmed and the Appeal which Skelly filed is denied.

(4) With the exception of the matters specifically referred to in Paragraph (2) above, this is a final order of the

Federal Energy Administration from which an aggrieved party may seek judicial review.

/s/ Melvin Goldstein

Melvin Goldstein
Director
Office of Exceptions and Appeals

Date: Mar. 19, 1976

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 10-14

GETTY OIL COMPANY,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENERGY,
Defendant-Appellee.

BEFORE HONORABLE JAMES M. CARTER, HONORABLE WILLIAM H. BECKER, AND HONORABLE ALFONSO J. ZIRPOLI, JUDGES.

Upon consideration of Appellant's Petition for Rehearing and upon the entire court's consideration of the Suggestion for Rehearing En Banc, it is ORDERED that the Petition for Rehearing is DENIED and that the Suggestion for Rehearing En Banc is DENIED.

FOR THE COURT:

/s/ Ruth H. Jacobson

Ruth H. Jacobson
Clerk

September 11, 1978

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing petition for a writ of certiorari have been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, as required by Rules 21.3 and 33 of the Supreme Court Rules; and that three courtesy copies have been served upon the Department of Energy.

William E. Wickens

Supreme Court, U. S.
FILED
DEC 4 1978
MICHAEL RODAK, JR., CLERK

No. 78-619

In the Supreme Court of the United States

OCTOBER TERM, 1978

GETTY OIL COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY AND JAMES R. SCHLESINGER, SECRETARY OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 1-a to 14-a) is reported at 581 F. 2d 838. The opinion of the district court (Pet. App. 15-a to 26-a) is reported at 448 F. Supp. 16.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 18, 1978. A petition for rehearing was denied on September 11, 1978 (Pet. App. 42-a). The petition for a writ of certiorari was filed on October 11, 1978. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, as incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1).

QUESTION PRESENTED

Whether petitioner's solvents were subject to the Federal Energy Administration's price regulations between April 4, 1974, and January 16, 1975.

STATEMENT

Section 4(a) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 753(a), provides in pertinent part:

> the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

Pursuant to Section 4(a), on January 15, 1974, the FEA published mandatory petroleum price regulations that defined the term "covered product" as "a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911." 39 Fed. Reg. 1950.[1] This definition included solvents, which are covered by Industry Code 2911. See R. A000204 para. 28 and A000335.[2] On February 4, 1974, the FEA amended this definition to exclude certain products:

[1]Regulations under the EPAA were first promulgated in January 1974 (see 39 Fed. Reg. 744, 1931) by the Federal Energy Office, to which the President had delegated his authority under the EPAA and portions of his authority under the Economic Stabilization Act of 1970. See Executive Order No. 11748, 38 Fed. Reg. 33575 (1973). The Federal Energy Administration was created on June 27, 1974, and assumed the responsibilities of the Federal Energy Office. Executive Order No. 11790, 39 Fed. Reg. 23185 (1974). We use the designation "FEA" to refer to both the Federal Energy Office and the Federal Energy Administration.

[2]"R." refers to the record filed in the Temporary Emergency Court of Appeals.

> "Covered products" means all products described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321 (except ethane) or 2911 (including benzene and toluene, but excluding ortho-xylene, meta-xylene, para-xylene and butadienes), and all forms of benzene and toluene.

39 Fed. Reg. 4467. The amended definition likewise encompassed solvents.

On April 5, 1974, the FEA amended this regulation a third time, defining "covered products" as "crude oil, residual fuel oil and refined petroleum products." 39 Fed. Reg. 12354. The amended regulation then defined the term "refined petroleum product" to mean "gasoline, kerosene, middle distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel." *Ibid.*

Petitioner interpreted this amendment as exempting its solvents from the pricing regulations, and, accordingly, from May 1, 1974, until the regulation was again amended on January 16, 1975, petitioner did not price its solvents as "covered products" (Pet. App. 17-a).[3] The FEA, however, concluded that petitioner's failure to price its solvents as "covered products" violated FEA's pricing regulations, and it issued a remedial order requiring petitioner to refund the amount petitioner had overcharged its customers between May 1, 1974, and January 14, 1975 (Pet. App. 17-a to 18-a).

Petitioner then instituted this action, seeking review of the FEA's remedial order and a declaratory judgment that FEA's regulation of the pricing and allocation of solvents was illegal and in excess of the agency's authority.

[3]The amended definition published on January 16, 1975, specifically included "solvents" within the definition of the term "covered products." 40 Fed. Reg. 2796.

The district court granted summary judgment for the FEA (Pet. App. 15-a to 26-a). The court concluded that petitioner's solvents are "distillates" within the meaning of the EPAA and therefore are subject to mandatory allocation and price regulation under 15 U.S.C. 753.[4] The court noted that the FEA had originally included solvents in its allocation and pricing regulations, and it rejected petitioner's contention that the April 5, 1974, amendment of FEA's regulations had exempted solvents from regulation (Pet. App. 23-a to 24-a). Indeed, given the statutory provision requiring the allocation of solvents, the court stated that any attempt to amend the regulations to exclude solvents would have been invalid (*id.* at 25-a to 26-a). Accordingly, the court concluded that petitioner had erred in treating its solvents as free of the EPAA price restrictions between May 1, 1974, and January 14, 1975 (*id.* at 26-a).

A divided panel of the Temporary Emergency Court of Appeals affirmed (Pet. App. 1-a to 14-a). The court agreed that the EPAA imposes a duty on the FEA to regulate the pricing and allocation of petitioner's solvents, which it found to be "distillates" within the meaning of 15 U.S.C. 752(5). It rejected petitioner's "hypertechnical argument that the pricing and allocation of the solvents in issue were somehow exempted from the mandatory coverage of the EPAA" as "unconvincing and unsupported in the plain language of the EPAA" (Pet. App. 6-a). It also rejected petitioner's contention that between May 1, 1974, and January 15, 1975, solvents were exempted from the definition of "covered products," concluding that petitioner's argument was based on "an obvious minor defect in drafting a subordinate definition of 'middle distillates'" in the amendments to the regulations governing pricing (Pet. App. 6-a to 7-a).

[4]15 U.S.C. 752(5) defines the term "refined petroleum product" in 15 U.S.C. 753(a) to include "distillates."

The court further concluded that "the allocation of the solvents in issue was clearly covered by the contemporaneous regulations of the FEA" (*id.* at 7-a to 8-a). It held (*id.* at 8-a) that given the provision requiring the FEA to regulate the price and allocation of solvents, "the existence of the allocation regulation was adequate and fair notice to [petitioner] that the solvents in issue were covered products," and as such their price was regulated by the general pricing regulations, 10 C.F.R. 212.83. Finally, the court rejected petitioner's argument (*id.* at 9-a) that the EPAA and regulations, so construed, were void for vagueness.

ARGUMENT

1. Petitioner contends (Pet. 17-19) that the FEA's regulations did not provide notice that the price of solvents was regulated and accordingly that the application of FEA's pricing standards to petitioner's past solvent sales violates the Due Process Clause.

The Temporary Emergency Court of Appeals correctly rejected this contention (Pet. App. 8-a to 9-a), finding that petitioner had "adequate and fair notice" that its solvents were subject to the FEA's price regulations. The court pointed out that Section 4(a) of the EPAA directed the FEA to regulate the price of solvents—which are petroleum "distillates" and thus "refined petroleum products" under 15 U.S.C. 752(5) and 753(a) (Pet. App. 6-a to 7-a). FEA's initial pricing regulations clearly included solvents (*id.* at 7-a), and solvents had not been decontrolled pursuant to the procedures established by Section 12 of the EPAA, 15 U.S.C. 760a, which requires Presidential action (Pet. App. 7-a).[5] The court noted (*id.* at 8-a) that the allocation of solvents was clearly

[5]Solvents were subsequently decontrolled pursuant to the statutory procedures, effective September 1, 1976. 41 Fed. Reg. 30096 *et seq.* (1976).

covered by the FEA's regulations at the time in question, 10 C.F.R. 211.182, and it concluded that petitioner had "adequate and fair notice" that solvents remained subject to the general price regulation as well.

Accordingly, there is nothing to the contention (Pet. 17, 21-22) that the court of appeals held petitioner was "bound to abide by regulations that the FEA should have issued but did not." To the contrary, after a review of the relevant provisions of both the EPAA and FEA's regulations, the court of appeals concluded that, despite some ambiguity engendered by FEA's amendment of its regulations, petitioner had adequate notice that the pricing regulation was applicable to solvents.[6] There is no reason for this Court to review that ruling. The regulation has long since been amended, solvents have been decontrolled (see note 5, *supra*), and the case thus presents no question of continuing significance.

2. Petitioner also urges (Pet. 19-21) that review is warranted because the holding that the FEA had a mandatory duty to regulate solvents under the EPAA conflicts with other decisions of the Temporary Emergency Court of Appeals.

The cases cited by petitioner do not conflict with the decision in the instant case. In *Consumers Union* v. *Sawhill*, 525 F. 2d 1068, 1077 (T.E.C.A. 1975) (en banc),

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[6]There is no merit to petitioner's argument (Pet. 23-24) that the court of appeals disregarded a finding of fact by the district court that petitioner did not know whether the FEA intended its regulations to apply to solvents. The district court commented (Pet. App. 26-a) that it did "not mean to attribute any degree of bad faith to [petitioner] for its interpretation of the April 5, 1974 regulation, and it would agree that '[petitioner] is not a seer nor can it devine [*sic*] the intent of the FEA underlying its own regulatory definitions.' " These general comments cannot fairly be characterized as a determination by the district court that the FEA's regulations were not adequate to give petitioner notice. But even if they could be so characterized, that determination would clearly be a ruling of law freely reviewable by the court of appeals.

the court began from the premise that "the Emergency Petroleum Allocation Act imposes upon FEA a mandatory duty to 'regulate' the price of new and released crude oil." It then concluded that although the FEA's pricing regulations allowed "new oil" to be sold at the market price, "the price of *all* crude oil [was] in fact regulated *within the meaning of the Act*" (525 F. 2d at 1078; emphasis in original). In *Mobil Oil Corp* v. *FEA*, 566 F. 2d 87, 103 (T.E.C.A. 1977), where the statutory language was ambiguous, the court upheld the FEA's conclusion that natural gas liquid products were refined petroleum products subject to regulation under the EPAA, noting the "strong indications from Congressional actions both before and after passage of the EPAA that Congress contemplated that these substances would fall within the ambit of agency authority." The court did not suggest that its holding was in any way inconsistent with the en banc court's conclusion in *Consumers Union* that the FEA had a duty to regulate crude oil. *Marathon Oil Co.* v. *FEA*, 547 F. 2d 1140 (T.E.C.A. 1976), cert. denied, 430 U.S. 983 (1977), is inapposite, since it concerned only the FEA's authority to regulate credit terms in its pricing regulations.

In any event, even if there were a conflict on this question within the Temporary Emergency Court of Appeals, the reconciliation of these internal differences would be a task for the Temporary Emergency Court and would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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